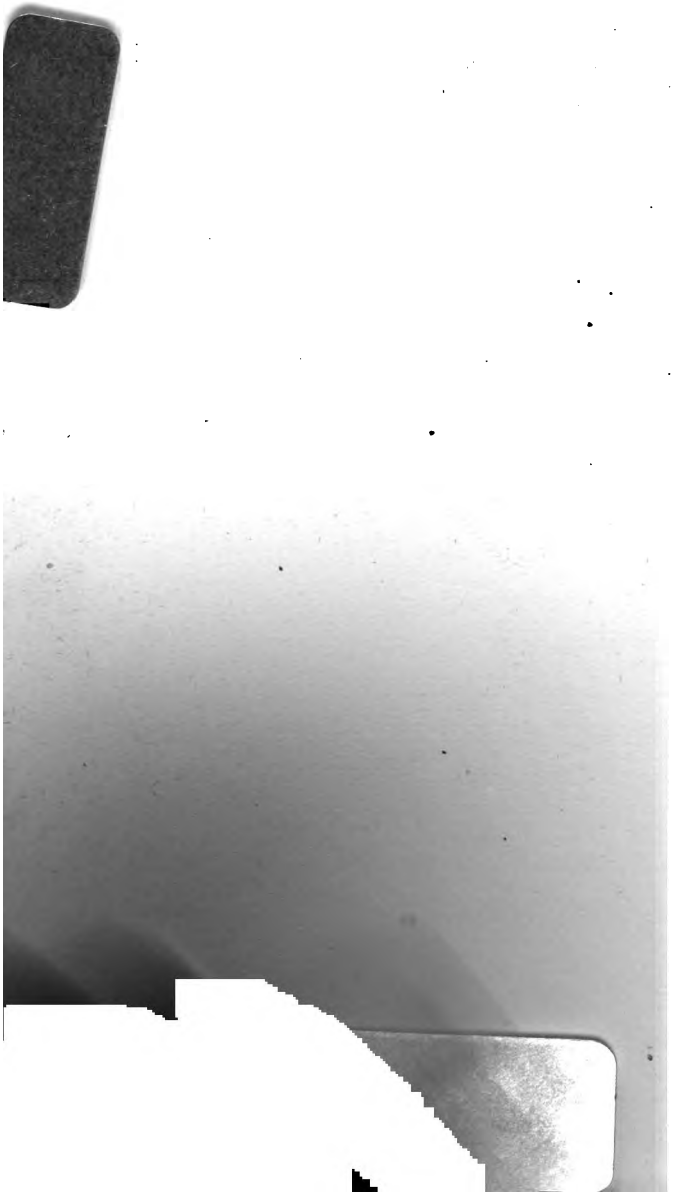

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LAW REPORTS.

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INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL. X.—1882-83.

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1883.

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OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

MUSSAMUT LACHHO . . . . . PLAINTIFF;

AND

MAYA RAM, MOHAMMED IBRAHIM, AND OTHERS . . . . . } DEFENDANTS.

J. C.*
1882
Nov. 15.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WESTERN PROVINCES.

Construction—Right of Pre-emption.

Held, that the following clause in a wajib-ul-arz: "Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews who may be sharers, and, in case of their refusal, in favour of other owners of the thoke," did not, according to its true construction, confer a right of pre-emption in the Defendants' thoke on the Plaintiff who was the owner of another thoke, but in no way interested in the Defendants' thoke.

APPEAL from a judgment of the High Court (Jan. 12, 1880), reversing a decree of the Subordinate Judge of *Aligarh* (Dec. 11, 1878) which decreed the Plaintiff's suit.

The Appellant sued to establish her right to pre-emption with regard to a one-third share of a mouzah called *Tholai*, which share

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the Respondent *Ibrahim*, on the 1st of March, 1878, had sold to one *Chut Ram* deceased, represented in this appeal by four of the Respondents, his heirs.

That right depended upon the construction of the clause of the wajib-ul-arz as given in their Lordships' judgment.

Tholai is divided into three thokes or shares; one of which belonged to *Ibrahim*, another to the Appellant, a third to a stranger to the suit. The entire area of *Tholai* is 1347 beegahs, of which the three shareholders held part in common, and part separately.

On the 1st of March, 1878, *Ibrahim* sold his share to the Respondent *Maya Ram* and the deceased *Chut Ram*, notwithstanding that the Appellant had been in treaty for it, and had nearly concluded the purchase.

The High Court held that the Plaintiff not having shewn that she was a sharer in the vendor's thoke had no right of pre-emption under the clause in question.

Doyne, for the Appellant, contended that according to the reasonable construction of the wajib-ul-arz and the intention of the parties to it "other owners of the thoke" included owners of another thoke.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that the judgment of the High Court was correct.

The question is, whether, upon the construction of the wajib-ul-arz in the record, the Plaintiff was entitled to a right of pre-emption in the Defendant's thoke. The words are:—"Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews, who may be sharers, and, in case of their refusal, in favour of the other owners of the thoke." The Lower Court seems to have treated the case as though the wajib-ul-arz had said, "in favour of the other owners or shareholders of

the village;" but it is "the other owners of the thoke." Now whether the thoke comprised the divided lands which were recorded as belonging to *Ibrahim* alone, or included the undivided lands which were appurtenant to those divided lands, the Plaintiff was no co-owner with *Ibrahim*. She was not a joint tenant, nor a tenant in common with him as to the divided portion of the lands; if she were a tenant in common of the undivided lands, that did not make her an owner of *Ibrahim's* share in those lands. A tenant in common is the owner of his own share; but he is not an owner of the other tenant in common's share. It appears, therefore, to their Lordships that the Plaintiff was not an owner of the thoke which was sold. The right of pre-emption is in favour of the tenant's own brothers and nephews. If they and the owner of the share were a joint undivided family, the brothers or nephews would be co-owners and sharers; there might also be other owners of the share with them. In such case, if the sharer wished to sell his share, his own brothers or nephews in the first instance, and in case of their refusal the other co-owners, would be entitled to the right of pre-emption. In this case the Plaintiff was not an owner or shareholder in the share sold, nor had she any interest in it; consequently the High Court was right in deciding that she was not entitled to the right of pre-emption.

Under these circumstances, their Lordships will humbly advise her Majesty that the decree of the High Court be affirmed, and the appeal dismissed.

Solicitors for Appellant: *Oehme & Summerhays.*

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HURRISH CHUNDER CHOWDRY . . . APPELLANT;

AND

KALI SUNDARI DEBIA . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Execution—Practice in regard to Orders in Council—Production of certified Copy —Act X. of 1877, *ss.* 610-588—*Charter of* 1865, *sect.* 15.

Where the effect of a Privy Council judgment was that each of two Plaintiffs was entitled to recover a moiety of a certain estate in possession of the Defendant, and Defendant purchased the share of one Plaintiff:—

Held, that the decree could be executed in part by the co-Plaintiff according to the extent of her interest in the estate under the decree.

The provisions of sect. 610 of Act X of 1877 cannot be construed as restricting the only possible evidence required to be produced by a petitioner to a certified copy, but as directory words with the object of insuring that proper information upon the subject of any Order in Council should be supplied to the Courts in *India*. Accordingly if one of the parties neglects to file the original decree, a copy, though not certified, may be admitted in evidence.

Whether or not an order under sect. 610 is a ministerial proceeding, if a judicial discretion is exercised thereunder, it may amount to a judgment under sect. 15 of the Charter of 1865, so that an appeal will lie. If in such exercise of judicial discretion a Judge usurps jurisdiction that alone would be a valid ground of appeal.

Sect. 588 of Act X. of 1877 does not apply so as to prevent an appeal from one of the Judges of the High Court to the full Court.

APPEAL from an order of the High Court (Jan. 13, 1881), reversing an order of *Pontifex*, J. (Feb. 27, 1880), which refused leave to the Respondent to execute a decree of the Subordinate Judge of *Mymensingh* (Mar. 10, 1874), as restored and affirmed by order of her Majesty in Council.

The facts are stated in the judgment of their Lordships.

The report of the case in appeal to her Majesty will be found in L. R. 5 P. C. 138. The Appellant, against whom a decree had been affirmed in that appeal became the purchaser of the

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share and interest of *Chundermoni* (one of the Appellants in the former appeal to her Majesty), in the talook in question in that appeal, *i.e.* of a moiety, and obtained thereby possession of the certified copy of the order of her Majesty in Council.

The Respondent *Kali Sundari* in respect of the other moiety of the talook applied to the High Court for execution; the Appellant objected thereto, first that the certified copy of the Order in Council had not been produced along with the application; second, that the decree affirmed by that order could only be executed in whole and not partly by one of the two Plaintiffs.

Mr. Justice *Pontifex* overruled the first objection as the Defendant himself had got that certified copy. He allowed the second objection and refused the application.

An appeal was preferred from that order to the High Court (*Garth*, C.J., *White*, and *Romeschunder Mitter*, JJ.), under sect. 15 of the Charter of 1865. A preliminary objection having been taken that an order under sect. 610 of Act X. of 1877 is not a judgment within sect. 15 of the Charter, and therefore is not appealable; the same was overruled (the Chief Justice dissenting).

The puisne Justices were of opinion that as Mr. Justice *Pontifex* had dealt with the question judicially and not in a purely ministerial manner, his judgment was appealable. Those learned Judges also concurred in holding that the judgment of Mr. Justice *Pontifex*, on the second objection, was erroneous, and should be set aside, and that the decree should be transmitted to the Court of the Subordinate Judge of *Mymensingh* for execution, according to the provisions of sect. 610 of the Code of Civil Procedure.

The Chief Justice was of opinion that Mr. Justice *Pontifex*, in dealing judicially with the application, had "usurped a jurisdiction in that respect which he did not possess," and that his duties were purely ministerial, and his order could, consequently, not be made the subject of an appeal under the 15th section, and "that the Privy Council is the only tribunal to rectify his order."

The judgment of the Chief Justice, which thus dissented from that of the majority of the Court, was as follows:—

"The point in this case upon which I am unable to agree with

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my learned brothers is as to whether we have jurisdiction to entertain this appeal.

"It appears to me that, having regard to the provisions of sect. 610 of the Civil Procedure Code, the duties of the High Court in dealing with decrees of the Privy Council are purely ministerial, and that any order which the Judge of the Privy Council Department may make when acting in a ministerial capacity cannot properly be considered as a 'judgment,' and consequently cannot be made the subject of appeal to a bench of this Court, under sect. 15 of the Charter.

"It is said that the duties of the High Court, under sect. 610, are not altogether ministerial, and that it may become necessary for the Judge acting under that section to determine certain questions judicially; as, for instance, if two persons presented themselves, each claiming to be entitled to the benefit of a Privy Council decree, it would be the duty of the Judge to decide which of those persons was really so entitled.

"But even in such a case I consider that the High Court would have no power to decide between the contending parties. The question, who is entitled to the benefit of the decree? is one which, in my opinion, should either be decided by the Privy Council or by the Court whose duty it is to execute the decree.

"If, as in the present case, the person claiming the benefit of the decree was no party to the appeal to the Privy Council, and there were any question whether, having regard to the true meaning of the decree, the claimant was entitled to take advantage of it, I consider that the Privy Council, who made the decree, would best understand its meaning, and would be the proper Court to determine that question.

"But if, on the other hand, the question did not depend upon the meaning of the decree itself, but upon something which had happened subsequently, as, for instance, if the decree holder had died, and the question was, who was his representative, or if the decree holder had assigned his interest, and the question was between the assignee on the one hand and the heirs of the decree holder on the other, this would be a question which, under sect. 610 of the Code, would have to be determined, as in other cases, by the Court which executes the decree, and having been

determined there, might be made the subject of appeal to the High Court.

"But the High Court, in my opinion, is neither the proper Court to put a construction upon the decree nor to determine questions which would in the ordinary course have to be decided in the execution proceedings. The High Court has merely to transfer the decree for execution to the Court below, and I think that sect. 610 has specially provided a means of notifying to the High Court the person or persons in whose favour and upon whose application the decree should be so transferred.

"The person who applies must do so by petition, and this petition must be accompanied by a certified copy of the decree or order which is sought to be executed. That certified copy can of course only be obtained at the Privy Council Office, and if any one applies for it other than the decree holder, I presume the question whether he is or is not entitled to a copy would have to be determined by their Lordships of the Privy Council.

"When therefore the Petitioner produces to the High Court a certified copy of the decree, that Court has then, and not till then, as I conceive, the duty thrown upon it of transferring the decree to the lower Court for execution, and it has no discretion, in my opinion, to refuse to perform that duty. The production of the certified copy is a sufficient warrant to the High Court that the party producing it is entitled to ask to have the decree executed, and the language of the section is imperative, that upon its production *the High Court shall transfer* the decree for execution.

"In this particular case the party applying did not produce a certified copy of the decree, and the learned Judge thought it right to dispense with the production of it because a certified copy had been produced by one of the other parties in the proceeding. I confess I doubt very much whether this was right. I think, for the reasons which I have just now explained, that the certified copy is not merely intended to satisfy the High Court that the decree exists, but that the person who applies for execution is entitled to the benefit of it. And this case affords a good illustration of the wisdom and propriety of such a provision, because here the applicant was no party to the appeal to the Privy

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Council; he had paid no share of the costs, and if he had applied to the Privy Council for a certified copy of the decree, their Lordships might with good reason have refused to allow him to share in the benefit of the decree until he had paid or given security to his co-Plaintiff for his share of the costs.

"I would, however, decide this appeal solely upon the ground that we have no jurisdiction to hear it. I think that if this Court, or any other Court, *has a mere ministerial duty to perform*, and refuses to perform it (no matter for what reason), the order or act of refusal can no more be considered as 'a judgment' than could the order of the Court made ministerially in compliance with that duty; and it is not because the learned Judge of the Privy Council Department has in this case acted *ultrà vires* in determining the rights of the parties, and has usurped, as I consider, a jurisdiction in that respect which he does not possess, that we have any right to usurp a jurisdiction also, and to treat his decision as 'a judgment' which may be reviewed in appeal under sect. 15 of the Charter.

"If any Court subordinate to the High Court were to usurp a jurisdiction in a similar way, and to refuse to perform some ministerial act, the High Court, in my opinion, could not confer upon itself a right to review the decision of the subordinate Court by way of *appeal*. Its proper course would be to set aside the decision and to order the subordinate Court to do its duty either under sect. 15 of the *High Court Act*, or sect. 622 of the Civil Procedure Code.

"In such a case as this, it seems to me that the Privy Council is the only proper tribunal to rectify the order of Mr. Justice *Pontifex*. But I cannot regret that my learned brothers have come to a different conclusion, because it is no doubt far more convenient that the mistake which we all agree has been made should be rectified here, instead of putting the parties to the trouble and expense of applying to the Privy Council. If it were merely a question of convenience, I should certainly have agreed with the other members of the Court, but as I consider it a question of principle by the decision of which we must be guided in other cases, I feel compelled, for the reasons which I have given, to dissent from their judgment."

Graham, Q.C., and *Woodroffe*, for the Appellant, contended that the Respondent was not entitled to apply for execution, inasmuch as she was not a party to the former appeal, and had never obtained a certified copy of the Order in Council, and did not produce it with her application. [The Registrar stated the practice with regard to the orders. The original was issued to the agents of the successful party or parties, and should be transmitted to the High Court, a certified copy being kept in *England*. *Doyne* said that the Appellant had obtained whatever order, original or otherwise, had been in regular course delivered to the parties and had kept it back.] Reference was made to sect. 231 of Act X. of 1877, and it was contended that the application was not properly framed thereunder. Further the decree was one which could not be executed in part. The proceedings shewed that there had been no decision as to the Respondent's alleged adoption, and no determination of the rights of the parties under *Kassiswari's* will. The original decree for possession in favour of the Plaintiffs proceeded solely on *Chundermoni's* title as derived from the sunnud of 1819. Her joinder of the Respondent as co-Plaintiff and joint claimant under *Kassiswari's* will ought not to be regarded as conclusive; and on appeal to Her Majesty, *Chundermoni's* daughters after her death advanced claims to the entire property to the exclusion of the Respondent. The judgment of the Privy Council declared that it was unnecessary to decide what the rights of the Plaintiffs *inter se* might be, and merely restored the decree of the first Court. But in her application for execution the present Respondent virtually sought to obtain a decision as to her *status*, and as to those very rights on which the judgment of the Privy Council was silent. The order of *Pontifex*, J., refusing it was therefore right.

Further it was contended that his order, right or wrong, was not appealable to the High Court. The Judge derived his authority to make that order through 24 & 25 Vict. c. 104, s. 11, from 3 & 4 Will. 4, c. 41, s. 21, and the rules made thereunder, and not from sects. 9 and 13 of 24 & 25 Vict. c. 104; and consequently no appeal lay under clause 15 of the letters patent. On this point *Anund Moyee Dassee* v. *Poorna Chunder Roy* (1), *In the*

(1) 6 Suth. W. R. Mis. 70.

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matter of Feda Hossein (1), were referred to. If on the other hand he were considered to be exercising the original or appellate jurisdiction of the High Court, as created by 24 & 25 Vict. c. 104, then his decision was not a judgment within clause 15 of the letters patent. See *Mowla Buksh* v. *Kishen Pertab Sahi* (2) and *Musst. Amirrunnessa* v. *Behary Lall* (3). Further such right of appeal even if granted by clause 15 had been abolished (see clause 44) by sects. 2 and 588 of Act X. of 1877, as amended by Act XII. of 1879. As to the power of the Governor-General so to affect the provisions of the Charter, see *In the matter of Feda Hossein* (1) and *The Queen* v. *Meares* (4). [SIR ROBERT P. COLLIER:—Before discussing the powers of the Governor-General in Council to interfere with the provisions of the Charter, it will be well to consider whether the order in question falls within sect. 588, the words of that section are, "and from no other *such* orders."] Sect. 591 shews that sect. 588 deals exhaustively with the question of orders, and that no order, whether original or appellate, is appealable save as provided by cap. xliii. of Act X. of 1877.

SIR ROBERT P. COLLIER:—Their Lordships only require to hear counsel for the Respondent on the point whether the order of *Pontifex*, J., was right upon the merits, that is, having regard to the actual circumstances of the case.

Doyne, for the Respondent, contended that whatever might ultimately be decided to be the rights of the co-Plaintiffs *inter se*, at least it was clear that the Respondent was entitled to present possession of her moiety. Her co-Plaintiff could not have opposed that, and the Appellant as purchaser of the co-Plaintiff's interest stood in no better position and could not oppose it. His position was that he was a wrong-doer, ordered to give up possession, which order as regards one-half of the estate the Respondent sought to enforce, leaving for future decision any questions of title which might arise between her and the Appellant as such purchaser. There was no necessity to decide the

(1) I. L. R. 1 Cal. 431.
(2) Ibid. 102.
(3) 25 Suth. W. R. 529.
(4) 14 Beng. L. R. 106.

question of adoption or any other question before execution. Whether the adoption was good or not, *Kali Soondari* had at least a life interest.

Graham, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In order to make the subject of this appeal intelligible a short statement is necessary. In the year 1819 *Sumhbhoo Chunder*, by a sunnud, conveyed to his sister *Kassiswari* a certain talook. Upon the construction of this sunnud various questions have since arisen. *Kassiswari*, treating the sunnud as having conveyed to her an absolute estate, disposed of it by her will, the material part of which is this:—"Of the whole of the rest of the rent-paying and rent-free immovable properties in benami and in my own name, in my possession and not in my possession, in which I have a right and interest, a moiety shall after my death be received by my daughter *Chundermoni*, and if she adopt a son by that adopted son, otherwise by her daughters, *i.e.*, by my granddaughters,"—naming them—"in equal shares; and the children born of their wombs, or adopted by them, shall from generation to generation get their (the grand-daughters') respective shares in the order of succession, and the other moiety shall be received by my daughter-in-law, *Srimutti Kali Soondari Debia*, and if she adopt a son by that adopted son, and by his children from generation to generation in the order of succession. But the same shall remain in the possession of my daughter-in-law, *Kali Soondari Debia*, till the said adopted son shall have attained his majority; and in case there shall be a misunderstanding between him and my daughter-in-law after he shall have attained his majority, the said adopted son and my daughter-in-law, *Srimutti Kali Soondari Debia*, shall receive equal shares" (of the property). "But, after the death of *Kali Soondari Debia*, her adopted son, or any surviving lineal heir of her adopted son, shall obtain the same" (her share of the property).

Upon the death of *Kassiswari*, the now Appellant, *Hurrish*

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Chunder, who was the son of *Sumbhoo Chunder*, took possession of this property; whereupon an action was brought to obtain possession of it by *Chundermoni* and by *Kali Soondari*, who were then widows. *Kali Soondari* having adopted a son, *Chundermoni* not having made an adoption. The plaint in that action claims possession. It recites the sunnud from *Sumbhoo Chunder*; the will and the death of the testatrix; and proceeds:—"In virtue of this will, I, Plaintiff No. 1,"—*i.e.*, *Chundermoni*,—"and I, Plaintiff No. 2,"—*Soondari*—"on behalf of the minor, have, since her death, become entitled to hold and enjoy all the aforesaid movable and immovable properties." The plaint goes on to state that the Defendant had unjustly intruded himself into this land. The Defendant denied most of the allegations in the plaint, among them the adoption of a son by *Kali Soondari*.

The Plaintiffs obtained a judgment and a decree from the Court of first instance; and it is necessary now to determine, as far as possible, what was the precise effect of that judgment. The issues raised were, "1st, Can *Kali Soondari* prefer this suit jointly with *Chundermoni*? 2nd, Had *Kassiswari Debia* authority to make a will, and did she make one? 3rd, If so, is the will valid, and can the Plaintiffs, jointly or individually, prefer the present action for the recovery of the talook with wasilat? 4th, Is it necessary to consider the question of adoption of a son or otherwise in the present action?"

The Judge, after disposing of the first two issues in favour of the Plaintiffs, proceeds thus:—"Touching the third issue, it is true the original will is not forthcoming, but an attested copy has been filed. I would accept the copy as evidence, as it was attested by the registration authorities, who have the original in their safe custody. The opposite party, I may remark, does not distinctly and emphatically deny the existence of the original will, the execution of which has been substantiated by witnesses." He finds in favour of the will. He proceeds:—"But even supposing there was no will executed, yet *Chundermoni Debia*, as the successor and child of *Kassiswari Debia*, can sue for the entire talook; and she herself has no objection to have *Kali Soondari* as a co-Plaintiff; therefore, the Plaintiffs can sue in the manner they have." It may be observed that there is no allega-

tion of or issue upon *Chundermoni's* heirship to *Kassiswari*, and the learned Judge's *dictum* on the subject is merely *obiter*. "For the aforesaid reasons it is not necessary to consider the question of adoption of *Shurut Chunder Lahiri*, the minor. To my mind the Plaintiffs can sue upon the will of *Kassiswari*, the existence and genuineness of which I do not doubt." Their Lordships regard this as, in effect, a suit for the purpose of establishing the will; and the only question to which the issues relate, and which really seems to have been tried, was whether it was valid, comprising the questions whether it was executed and whether the testatrix had the right to make it. The decree is in pursuance of this judgment, and goes on to affirm, "The Plaintiffs institute this suit against the Defendant, on the basis of the said will, for the recovery of possession after establishment of their shikmi right," and so on. And it concludes:—"That this case be decreed with costs in favour of the Plaintiffs, and that the Plaintiffs do recover from the Defendants possession of the disputed mouzahs and the costs of Court and wasilat from this day until realisation, with interest at the rate of 6 per cent. per annum." It is true that, if the plaint be read with technical strictness, the second Plaintiff sues only in right of her adopted son; but it does not seem to have been so understood by the Judge, who meant to give each of the ladies possession of half the property, and declined to try the question of adoption, because, whether the adoption were proved or disproved, *Kali Soondari's* right to immediate possession remained. Their Lordships are not prepared to say that the Judge was wrong in taking this broader view of the question before him.

An appeal was preferred to the High Court against this judgment, and it was reversed by the High Court on the ground that the testatrix only took an estate for life, and therefore was incompetent to dispose of the property by will; but the High Court also treat the action as one brought for the purpose of establishing the validity of the will. The daughters of *Chundermoni* (she having died before the last-mentioned judgment) appealed to the Queen in Council, and by Order in Council the judgment of the High Court was reversed, and the judgment of the Subordinate Court was affirmed. With respect to the judgment of the

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Subordinate Judge, their Lordships observe:—"No dispute was raised as to the genuineness of the will of *Kassiswari* or its validity to pass whatever interest she was capable of devising. The Subordinate Judge gave judgment in favour of the Plaintiffs. The grounds of his judgment, which are not very clearly stated, would appear to be, that, in his opinion, *Chundermoni* took an absolute estate under the sunnud on the death of her mother; but that, having elected to take under her mother's will and to admit the co-Plaintiff to a half share of the estate, both the Plaintiffs were entitled to maintain the action against the Defendant." Their Lordships also observe that their decision was not intended to conclude any question between the co-Plaintiffs.

The judgment of the Queen in Council was sent to *India* to be executed, but in the meantime the Defendant had acquired the interest of the Plaintiffs in *Chundermoni's* moiety, whereupon an application was made to Mr. Justice *Pontifex*, on behalf of *Kali Soondari*, who claimed the other moiety, for an execution of the judgment of the Court of first instance as far as that moiety was concerned.

Mr. Justice *Pontifex* was the Judge appointed under the power, which had been previously conferred by statute upon the High Court, to execute a portion of their jurisdiction, viz., that which related to enforcing the orders of the Privy Council and other questions having to do with the relations of the Privy Council to the Courts in *India*. That learned Judge refused to direct execution under sect. 610 of Act X. of 1877, which regulates the procedure for enforcing the execution of any order of Her Majesty in Council. That section is to this effect: "Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal, and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty, by her said order, may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted

shall enforce or execute it accordingly in the manner and according to the rules applicable to the execution of its original decrees." Mr. Justice *Pontifex* in a short judgment observes, "This is an application for the execution of a Privy Council decree, in part, by one of two Plaintiffs. The original Court passed a decree in favour of both the Plaintiffs. On appeal to this Court that decree was overruled. One of the Plaintiffs only appealed to the Privy Council, and on appeal to the Privy Council the decree of the original Court was restored and that of this Court reversed. The Privy Council, in their judgment, expressly said they would not decide the rights of the Plaintiffs *inter se*. Subsequently the Defendant, who is in possession of the property, bought the interest of the appealing Plaintiff. The party who did not appeal, having applied to execute decree, has been met with two objections, the first under sect. 610 of Act X. of 1877, that that application could not be granted because it was not accompanied by a certified copy of the decree of Her Majesty in Council. But the Defendant himself has got that certified copy, and therefore I think the objection under sect. 610 cannot be sustained."

Their Lordships think it well, before proceeding further, to say that they entirely agree with the learned Judge in this view, which was adopted by the Appellate Court. The practice with respect to the decrees of Her Majesty in Council seems to be this:—The original decree is given to the successful party, or to one of the successful parties, to the appeal. That is taken to *India*, and it is the duty of the person to whom it is given, as he is informed by a written circular, a copy of which has been read, to file that original decree in the High Court of *Calcutta*. That being done, the proper officer of the Court in *Calcutta* would be able to give a certified copy, or indeed the Registrar of this Board would be able to do the same. It seems that in this case the Defendant got, through *Chundermoni*, whose interest, as before stated, he had taken, the original order. He neglected to file it, as he ought to have done, in the Court, and it was under those circumstances that Mr. Justice *Pontifex* held that a copy of that order, though perhaps not a certified copy, might be properly admitted, and their Lordships think he was right. The provi-

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sions of sect. 610 cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in *India*. Mr. Justice *Pontifex* proceeds—"The other objection to the execution of the decree of the Privy Council was that the decree of the original Court, upheld by the Privy Council, could only be executed as a whole, and not partly by one of the two Plaintiffs. Mr. *Phillips* relies on sect. 231 of Act X. of 1877. Now the two Plaintiffs claim under a will which is not free from difficulty. The Privy Council decline to construe the will as between the two Plaintiffs claiming under it. I think, therefore, I must refuse this application for execution, and the applicant must be left to a regular suit to enforce her claim to any share of the property."

From this order or judgment of Mr. Justice *Pontifex* an appeal was preferred to the High Court. All three of the learned Judges of the High Court, the Chief Justice and the two puisne Judges, were of opinion that Mr. Justice *Pontifex* had exercised a wrong discretion, and that he ought to have sent the case for execution; but the Chief Justice was of opinion that no appeal would lie from the proceeding before him, and that his error could not be set right. The two puisne Judges were of opinion that an appeal would lie under sect. 15 of the Royal Charter of 1865, which is in these terms:—"We further ordain that an appeal shall lie to the said High Court of Judicature, at *Fort William* in *Bengal*, from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to sect. 13 of the said recited Act"—the said recited Act, with regard to this matter, having enabled the Court to confer upon a Judge, or a division of the Court, the power of the Court itself. These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under sect. 610 would or would not be a merely ministerial proceeding, Mr. Justice *Pontifex* had in fact exercised a judicial discretion and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of *Kali Soondari* to an execution in

this suit. They held, therefore, that it was a judgment within the meaning of sect. 15.

The Chief Justice was of opinion that it was not a judgment: and he seems to have based his opinion in a great measure upon the ground that, in his view, Mr. Justice *Pontifex* had no jurisdiction to inquire at all whether or not *Kali Soondari* had a right to execution; that his function was merely ministerial; that all he could do, or ought to have done, was to transmit the decree of Her Majesty in Council to the Lower Court for execution; that he usurped a jurisdiction which did not belong to him; and that under those circumstances no appeal would lie. Their Lordships do not think that Mr. Justice *Pontifex* can be properly treated as having usurped jurisdiction; but, if he had, this would have been a valid ground of appeal, and they are unable to agree with the Chief Justice, that if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice.

It only remains to observe that their Lordships do not think that sect. 588 of Act X. of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court.

The remaining question is whether Mr. Justice *Pontifex* was right in refusing to make the order in question; and their Lordships are of opinion that the learned Judge was wrong. They are unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the Plaintiffs—a doctrine which, as pointed out by the High Court, would lead to the consequence that a Defendant could prevent the execution of a decree by buying the interest of one of the Plaintiffs. The effect of the judgment which had to be enforced was, in their Lordships' view, as has been already expressed, that the second Plaintiff, *Kali Soondari*, was entitled to possession of half of the estate in question. The Defendant had obtained the share of *Chundermoni's* representatives. As far, therefore, as that share was concerned, he was in no better position to dispute any right the Plaintiff might have to execution than *Chundermoni* herself would have had; and it appears to their Lordships that *Chunder-*

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moni would have had no right in this suit to dispute the title of the Plaintiff to present possession of a moiety of the land. As a Defendant he had no better rights. As against the Plaintiff he was a wrongdoer; and as against him she had an immediate right to possession. But it has been asserted that he had a right to have the question of the adoption by *Kali Soondari* determined, and that this question could not be determined in an execution proceeding, to which latter proposition their Lordships assent. But if the adoption were set aside, still *Kali Soondari* would have a life interest in the property, and could maintain the action in respect of that interest. With this view, as already pointed out, the Judge of first instance found in her favour, declining to try the question of adoption, and it is his judgment which has now to be executed. Any possible hardship which the Defendant might complain of in the present judgment operating as an estoppel against him, or otherwise unfavourably to his trial of this question, should it ever arise, will be obviated by a declaration that the decree is to be executed in respect only of the share to the possession of which *Kali Soondari* is entitled under and by virtue of the will, and that nothing in this judgment shall affect any right which the Defendant may at any time have to question the validity of the adoption.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, coupled with this declaration, and to dismiss this appeal with costs.

Solicitors for the Defendant: *Watkins & Lattey.*
Solicitors for the Respondent: *Barrow & Rogers.*

THE MAHARAJAH OF BURDWAN . . DEFENDANT;

AND

SRIMATI TARA SOONDARI DEBIA AND OTHERS . . . . . PLAINTIFFS.

J. C.*
1882
Nov. 23.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Reg. VIII. of 1819—*Sale for Non-Payment of Rent—Due Publication of Notices —Duty of Zemindar.*

Held, that the due publication of the notices required by Regulation VIII. of 1819 forms an essential portion of the foundation on which the summary power of sale is exercised, and that the zemindar who institutes the proceeding is exclusively responsible for its regularity, and should take care that due publication is not left matter of controversy.

APPEAL from a decree of the High Court (March 22, 1880), reversing a decree of the Judge of the zillah *East Burdwan* (May 2, 1878).

The High Court decreed the Respondents' suit, and ordered that the sale of the Respondents' putni tenure held for arrears of rent due to the Appellant be set aside owing to the non-publication of the notification of sale on the land of the defaulter, as required by Regulation VIII. of 1819, under which regulation the sale had been held.

The facts appear in the judgment of their Lordships.

Cowie, Q.C., and *C. W. Arathoon* contended that the evidence shewed that due publication of the required notice had been made, and that the sale should not have been set aside. Reference was made to *Sona Bibee* v. *Lal Chand Chowdry* (1); *Ramsabuk Bose* v. *Monomohini Dasi* (2); *Sreemutty Dossee* v. *Pitambur Panda* (3).

The Respondents did not appear.

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 9 Suth. W. R. 242. (2) Law Rep. 2 Ind. Ap. Ca. 77; 23 Suth. W. R. 113.
(3) 24 Suth. W. R. 133.

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The judgment of their Lordships was delivered by

LORD FITZGERALD :—

This case comes before us *ex parte*. The suit was to set aside a sale of a putni talook which took place by auction for non-payment of rent, the allegation of the Appellant, who was the Plaintiff in the suit, being that the sale was illegal in consequence of non-observance of Regulation VIII. of 1819. By that regulation it is provided with reference to cases where sales are to take place in certain districts and under certain circumstances for non-payment of rent, that "on the first day of Bysakh of the following year from that of which the rent is due the zemindar shall present a petition to the civil court of the district, and a similar one to the collector, containing a specification of any balances that may be due to him on account of the expired year from all or any talookdars or other holders of an interest of the nature described in the preceding clause of this section." Having presented this petition both to the civil court and to the collector, "the same shall then be stuck up in some conspicuous part of the kucheree, with a notice that, if the amounts claimed be not paid before the 1st of Jyte following, the tenures of the defaulters will on that day be sold by public sale in liquidation." Then it provides that "A similar notice shall be stuck up at the sudder kucheree of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the kucheree, or at the principal town or village upon the land of the defaulter." It is admitted that there was a compliance with the two earlier provisions, but the question arises whether a copy or extract of the notice applying to the individual case was sent by the zemindar to be published "at the kucheree, or at the principal town or village upon the land of the defaulter." The regulation goes on:—"The zemindar shall be exclusively answerable for the observation of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same; or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in

attestation of the notice having been brought and published on the spot. If it shall appear from the tenor of the receipt or attestation in question that the notice has been published at any time previous to the 15th of the month of Bysakh, it shall be a sufficient warrant for the sale to proceed upon the day appointed. In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the kucheree of the nearest moonsiff, or, if there should be no moonsiff, to the nearest thanna, and there make voluntary oath of the same having been duly published—certificate to which effect shall be signed and sealed by the said officers and delivered to the peon." That is a very important regulation, and no doubt it was enacted for a certain and defined policy, and ought as a rule to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar who institutes the proceeding exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision to which their attention was called, of Sir *Barnes Peacock*, when he filled the office of Chief Justice of the High Court of *Bengal*, to the effect that if the notice itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. That decision was alluded to in a case before this tribunal, in which their Lordships say they are disposed to agree with the judgment of the High Court confined as it is to cases where there is proof that the notice was duly served. That, again, is where there is no controversy as to the fact of the service. It seems to their Lordships that the object of the Regulation was that due service or publication should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the foundation of the sale. Accordingly if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager, signed under his hand, and if

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he gets such a receipt there is an end to all question as to the service. If he does not find the defaulter or his manager, or if that person will not sign a receipt, then he is to call in three substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published. If they object, as very likely villagers would object, to be parties to the proceedings for the enforcement of a sale, then he is obliged to go to the nearest moonsiff, and make a voluntary oath of the fact of service, which act is immediately recorded, and forms the foundation upon which the officer afterwards proceeds in carrying out his sale. Thus the evidence that the notice has been given is immediately preserved and the fact is not left to be matter of controversy afterwards.

The issue in this case is as to whether the provisions of Regulation VIII. of 1819 have been complied with. The case before us differs from that before the Chief Justice of *Bengal*, and equally from that case which was before this tribunal, in this, that the fact of service here is matter of controversy. We should be obliged to assume, in order to arrive at a conclusion one way or the other, either that there was a conspiracy to cheat and deceive upon the part of the Plaintiff *Charoo* and the two chowkidars who are represented to have assisted in the fraud, or that there was a conspiracy on the part of the peon sent to effect this publication, who, having, it is said, neglected his duty, conspired afterwards with a confederate to make a false statement and forge a receipt.

The Judge in the Primary Court delivered his judgment in favour of the Appellant. He had the advantage of seeing and hearing the witnesses, and he has expressed his decision in vigorous language. But there was an appeal on the question of fact, and upon that question of fact two Judges of the High Court have concurred in thinking that the Judge of the Court below was wrong, and have come to the conclusion that the Plaintiff and his witnesses have told the truth. It shews that not alone is the fact of publication in controversy, but that the matter is so involved that it is difficult to come to a safe conclusion upon it. Their Lordships do not propose to say upon this controverted question of publication on which side the weight of evidence lies.

Their Lordships will humbly advise Her Majesty to affirm the

decision of the High Court, and upon this ground: The doubt or difficulty in the case is one that would not have existed save by the neglect of those representing the Maharajah. There is no evidence save the statement of the peon *Khetu* that the notice was ever entrusted to him; but supposing it was entrusted to him for publication, his duty, and that of the officers of the Maharajah, would have been clear and plain. He should have ascertained when he went to make the service that the person whom he represents to be *Charoo*, to whom he says he delivered the notice, was the defaulter, or the agent of the defaulter. He should then have obtained his receipt, a receipt proper in form. If he could not obtain it he should have followed the course prescribed by the Regulation, and should at once have returned the documents to the proper officer of the Maharajah. It would then have been the duty of that officer to examine the receipt and see that it was in all respects complete and regular as part of the foundation of the title afterwards to be given by sale. Their Lordships have before them a copy of the supposed receipt, which appears to be enveloped in mystery from the time it was alleged to have been signed. The peon gives no history of it. What did he do with it? To whom did he give it? Where has it been? All that is left in obscurity, and no confirmatory proof is produced from amongst the servants of the Maharajah that the peon, having effected what he alleged to be service, brought in this receipt with him, and filed it in the collectorate or with the proper officer of the district. What is the document itself when we come to look at it? The professed signatures are at the top. The first is that of *Brojo Mohun Banerjee*. That purports to be the name, not quite the correct name, of the registered proprietor of the talook, who has been dead many years, and if this had been brought to and examined by the servants of the Maharajah they must have seen that the dead man could not have signed it; there is no doubt that they knew that this registered proprietor was not alive. The next signature is that of *Redoznath Banerjee*, who is put down as the karpurdaz, meaning the karpurdaz of the dead man, *Brojo Mohun Banerjee*. This turns out to be a non-existing individual; there is no such person. Then we come to the attesting witnesses at the foot, and they are

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Goburdhun Chowkidar and *Gopal Chowkidar*, residents of *Salmula*. The inference from that would be that they were the chowkidars of *Salmula*. If there are such persons in existence, there are no such chowkidars at *Salmula*, and neither of the chowkidars of *Salmula* have been produced on either one side or the other. This document or receipt so produced by the peon is by no means a compliance with the provision of Regulation VIII. Their Lordships think that the absence of that care and attention which ought to have been shewn with reference to this document, and the absence of any contemporaneous inquiry whether there had or had not been a publication of this notice, as required by the Regulation, have created the very difficulty which the Regulation was intended to prevent; and as the Regulation makes the zemindar exclusively answerable for the observance of its provisions, their Lordships are of opinion that the issue as to the Regulation ought to be found in favour of the Respondents; and will therefore humbly report to Her Majesty, as their opinion, that the decree of the High Court of Judicature ought to be affirmed and this appeal dismissed.

Solicitor for Appellant: *T. L. Wilson.*

R. OLPHERTS AND E. MACNAGHTEN DECREE-HOLDERS;

AND

MAHABIR PERSHAD SINGH AND ANOTHER . . . . . } JUDGMENT DEBTORS.

J. C.*
1882
Nov. 23, 24.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Act X. of 1877, *sec.* 311—*Material Irregularity—Substantial Injury—Inadequate Price must be proved to result from Irregularity.*

In order to set aside an execution sale under sect. 311 of Act X. of 1877, there must have been material irregularity in publishing or conducting it, and the applicant must further prove substantial injury in consequence of the irregularity.

Held, that the not stating the amount of Government revenue in the proclamation of sale is an irregularity which may be properly (*i.e.* in the Court of first instance) objected to; but if inadequacy of price is relied upon as substantial injury, such injury must be proved, under sect. 311, to have occurred in consequence of the irregularity, and cannot be assumed to have so occurred, by the Appellate Court, in the absence of evidence.

APPEAL from a judgment of the High Court (April 22, 1881) reversing an order of the Officiating Subordinate Judge of *Tirhoot* (Sept. 25, 1880) which disallowed the petitions of objection filed by the Respondents.

The facts appear in the judgment of their Lordships.

The High Court (*R. C. Mitter* and *Maclean*, JJ.) set aside the sales of twenty villages to the Appellants in execution of a decree obtained by them against the Respondents; but on the 1st of September, 1881, in review, it varied the order as regards six out of the twenty villages. The sales had been effected for about Rs.20,000.

The material portion of the judgment of April 22, 1881, was as follows:

"The application was made on the ground that a property of a very large value was sold at a grossly inadequate price, attachment processes and sale proclamations not having been duly

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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executed and published in the villages. Upon both these points the Lower Court has found against the judgment debtors. As regards the adequacy or otherwise of the value, the finding is manifestly against the weight of the evidence. Of the twenty villages sold, nineteen were let in ticca by two leases in favour of the decree-holders. The net rent payable annually, under the two leases, was Rs.4172 and odd. The leases also cover twenty villages, one of which has not been sold. There is evidence to shew that the twentieth village sold, which is not covered by the lease, is of comparatively more value than the unsold village of the lease. Therefore, upon the evidence, it may be safely taken that the villages sold yielded annually a little over Rs.4172. The Lower Court remarks that the decree-holders adduced no evidence to shew what is the general rate of value of landed property in the district. It is true that no direct evidence has been given upon that point. But instances in which property has been sold in the district, at not less than twenty years' purchase, have been proved. Calculating at that rate, it is clear that the villages sold are worth about Rs.60,000.

"Upon the question, whether the sale proclamations were duly published, we do not think that the finding of the Lower Court is wrong. But it may be reasonably supposed, that the non-specification of the Government revenue in the sale proclamations published, is one of the causes which caused the diminution in the price. Such a mistake or omission is an irregularity contemplated by sect. 311 of the Civil Procedure Code (see *Girdhari Singh* v. *Hurdeo Narain* (1)). It is true that this irregularity was not made one of the grounds of the Appellants' application in the Lower Court. But it is patent upon the face of the proceedings."

On the 1st of September, 1881, the judgment in review was as follows:—

"The judgment of this Court proceeded upon the ground that the Government revenue of the mouzahs sold (the auction sale of which was sought to be set aside) was not specified in the sale proclamation, and we were of opinion that that was such an irregularity as really affected the prices which those mouzahs fetched

(1) Law Rep. 3 Ind. Ap. 230.

at the auction sale. We further found that the prices which were paid by the Petitioners, who were the purchasers and decree-holders, were inadequate.

"It is contended on behalf of the Petitioners now before us, that in respect of six mouzahs the ground upon which the judgment of this Court proceeds is not applicable, inasmuch as the Government revenue of these six mouzahs was specified in the sale proclamation. It is admitted now by the learned pleader, who appears on behalf of the judgment-debtors, that in respect of these mouzahs, the Government revenue was specified in the sale proclamation; but he contends that, in stating the revenue of *Bazitpore*, instead of putting Rs.547 odd annas, which is the correct amount, the amount mentioned in the sale proclamation of that mouzah was Rs.500; and a similar mistake is pointed out in respect of *Jahangira*, the correct amount being Rs.335 7*a*. 9*p*. and the amount mentioned in the sale proclamation having been Rs.345. It is not denied that in respect of the other mouzahs the Government revenue was correctly specified. Therefore, as regards those four mouzahs, our order is not right, and must be set aside. With reference to *Bazitpore* and *Jahangira*, the mistakes are so trivial and unimportant, that we do not think that they in any way affected the prices of those mouzahs.

"We are, therefore, of opinion that in respect of all these six mouzahs our judgment is not right; and we accordingly amend it, by directing that the appeal of the judgment-debtors in respect of these six mouzahs should be dismissed. In all other respects our judgment will stand."

Macnaghten, Q.C., and *Woodroffe*, for the Appellants, contended that the omission in some of the sale proclamations to specify the Government revenue assessed upon the villages was not under the circumstances a material irregularity in publishing or conducting the sale thereof under sect. 311 of the Code. Moreover, it was not made one of the grounds of objection to the sales in the Court of first instance. Upon the evidence it was not established that the price obtained was inadequate, and even if it had been there was no evidence that such inadequacy was the result of any proved irregularity. It is not to be presumed that substantial injury

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has resulted from any alleged cause; it must be shewn to have thence resulted. Here, as in some of the proclamations, the Government revenue was specified, and the price of all is alleged to be inadequate, such inadequacy must have been due to some other cause than the irregularity complained of. Reference was made to *Girdhari Singh* v. *Hurdeo Narain* (1).

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This was an application to set aside a sale of certain property in execution of a decree in consequence of irregularity. The application was made under section 311 of the Civil Procedure Code of 1877, chap. 10. By that section it is enacted that "The decree-holder or any person whose immovable property has been sold under this chapter may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." Irregularity, therefore, alone is not a ground for setting aside a sale. There must be some substantial injury in consequence of the irregularity, and that must be proved by the applicant. It has also been held that inadequate price of itself is not a sufficient ground for setting aside a sale, unless there is irregularity. The question, therefore, in this case is whether an irregularity did occur, and, if so, whether that irregularity caused injury to the applicant; the injury complained of being the inadequacy of the price which was realised at the sale. The principal irregularity complained of was that no notification of the sale was properly published. Section 286 of the same Code provides that "Sales in execution of decrees shall be conducted by an officer of the Court or by any other person whom the Court may appoint, and, except as provided in section 296, shall be made by public auction in manner hereinafter mentioned."

(1) Law Rep. 3 Ind. App. 230.

Then section 287 says—"When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible the property to be sold; the revenue assessed upon the estate, or part of the estate, when the property to be sold is an interest in an estate or a part of an estate paying revenue to the Government;" and certain other things.

In addition to the irregularity as regards the notification of the sale, another alleged irregularity was complained of, viz., that the attachment was not properly notified. Whether the notice of attachment not having been properly published would affect the sale, or be an irregularity in conducting the sale, it is not necessary to inquire, inasmuch as that point was given up by the applicant on the trial before the Judge. The question then is solely in respect of the alleged irregularity in the proclamation of the sale. The applicant contended that the proclamation had not been published. He did not contend that in the proclamation the particulars were not properly described as required by the Act. He said in effect that no proclamation had been published. The parties went down to trial upon that point, evidence was given, and the learned Judge of the First Court held that the proclamation had been published, and the High Court affirmed the decision of the first Judge in that respect. There are, therefore, two concurrent findings of the Courts that a proclamation was published.

The Judge consequently refused to set aside the sale. The parties appealed to the High Court. They never took any objection in their grounds of appeal to the form of the proclamation, or stated that there was an irregularity in not having stated all that was required by the Act, and, amongst other things, the revenue which was assessed upon the estate. When the case came before the High Court it was discovered that in the proclamations which were published the amount of revenue had not been stated, and the High Court at that time considered that all the proclamations were alike, and that in each of the proclamations with regard to the twenty mouzahs which were sold the

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amount of revenue had not been stated. It may be inferred from the grounds of review that the Court themselves first took the point; but whether it was taken by the Court or by the applicant is immaterial, because their Lordships are of opiñion that the objection could not be taken for the first time in the Court of Appeal. Even if the objection could have been properly taken at that stage of the proceedings, if no question was raised before the Lower Court as to whether any injury had been sustained by the applicant by reason of the proclamation not stating the amount of revenue, that question was never tried in the Lower Court, and no evidence had been given with reference to it.

The objection, if it had been properly taken in the first instance, would have been good to this extent, that not stating the amount of revenue was an irregularity; but even then there would have been something more to be proved than the mere irregularity—it would have been necessary to go on and shew that substantial damage had been sustained by the applicant in consequence of that irregularity. No evidence was given upon that subject before the Lower Court, though by sect. 311 the onus lay upon the applicant to prove to the satisfaction of the Court that he had sustained substantial damage in consequence of the irregularity; nor was there any finding of the Lower Court upon it, because the question was never raised.

The High Court, having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say:—"But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes which caused the diminution in the price." There was no evidence at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale.

The High Court, however, upon the ground that there was an irregularity, and that it had caused substantial injury to the applicant, reversed the decision of the Lower Court. Upon that

a review was applied for, and then it was discovered that the objection as to the non-statement of the revenue did not apply to six of the mouzahs and six of the sales; and the High Court, having found that the proclamation in respect of those six did contain the amount of the revenue, set aside their former decision as to them, and upheld it as to the other fourteen. But when they upheld the sale as to the six they never adverted to the fact that, as they had fallen into a mistake as to them, they might equally have fallen into a mistake as to the other fourteen. They found that the inadequacy of price as regards the six did not arise from the non-statement of the amount of revenue. They might, therefore, have reasonably supposed that their former supposition, that the inadequacy of price as to the fourteen was occasioned by the non-statement in the notice of sale of the amount of revenue, was as much without foundation as it was as to the six; but instead of that they upheld their decision as to the fourteen, and set it aside as regarded the six. The question now is whether the judgment of the High Court as regards the fourteen is correct in holding that there was an irregularity in the non-statement of the amount of revenue in the proclamation which could be relied on upon appeal, and that the Appellant had sustained substantial injury by reason of that irregularity.

Their Lordships think that it was too late for the applicant to make the objection; and even if it were not too late for him to make the objection before the High Court, there was no evidence to justify the High Court in arriving at the conclusion that there was an inadequacy of price occasioned by the non-statement of the revenue in the sale proclamation.

Under these circumstances, their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to affirm the decision of the First Judge. They think that the Respondent must pay the costs of this appeal and the costs in the High Court.

Solicitors for Appellants: *Lawford, Waterhouse, & Lawford.*

J. C.* 1882 Nov. 17; Dec. 9.

SRIMATI JAṆOKI DEBI . . . . . PLAINTIFF;

AND

SRI GOPAL ACHARJIA AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mohunts—Succession—Law of Inheritance—Usage.

Where, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage. If the usage has not been proved to be according to the ordinary rules of inheritance a plaintiff cannot succeed under such rules.

APPEAL from a decree of the High Court (Jan. 29, 1877) dismissing an appeal from a decree of the Subordinate Judge of *Manbhoom* (Aug. 31, 1874) whereby the Appellant's suit was dismissed with costs.

The case in the Court below is reported in Ind. Law Rep. 2 Calc. Series, p. 365.

The facts are stated in the judgment of their Lordships.

The Appellant claimed to succeed to the sebaitship in question with possession of the dewutter properties in dispute by right of inheritance as widow and heiress of the last sebait: the Respondent was in possession. The properties were dedicated at some period before 1178, B.S. to certain deities of the name of *Keshub Roy*, &c., and the chief guddi was situated at *Bero* in *Manbhoom*. The sebaitship had at that date been granted by the Rajah of *Panchkote* to *Rungraj Goswami*, the ancestor of the Appellant's husband.

The material part of the judgment of the High Court (*Markby* and *Romes Chunder Mitter*, JJ.), was as follows:—

There are certain peculiarities in the history of this office, which renders it necessary to approach the consideration of this question with very great caution. But finding, as we do, the Defendant *Gopal* in possession of the office, and the objects of

Present:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

the endowment being carried out under an arrangement, undoubtedly made in good faith, by the members of the family for that purpose, we feel the greatest unwillingness to disturb that arrangement. Without, therefore, saying that there is anything in the nature of this office which would prevent its being confined to the members of a particular family, and being regulated by the ordinary rules of inheritance, and without accepting the view taken by the Subordinate Judge, that females would, by reason of their sex, be excluded from the succession, we still think that the Plaintiff ought to make out clearly that, as she asserts, she is entitled, as heiress of her husband, to succeed to the office, and to turn out the Defendant *Gopal*. The presumption in her favour, from her husband having been in possession, would not apply in this case in the same way and with the same force as if the question were, who was to succeed to her husband's private estate. There the ordinary rule of inheritance must prevail, unless displaced by some special rule. Here the very question at issue is, whether the rule of inheritance prevails at all. It is, therefore, necessary to look into the history of the endowment since its establishment, to see how the office of sebait has, in fact, devolved from one holder to the other. We may say at once that there is, in our opinion, no satisfactory evidence before us that the appointments have been made by the Rajah of *Panchkote*. The attempt, therefore, to base the claim of the Defendant *Gopal* to be sebait upon his appointment by the Rajah, and the claim of the Rajah to the right to appoint, have therefore failed. Then what is the evidence that the office descends in the family of the Plaintiff's husband, according to the rules of inheritance under Hindu law? The first sebait, *Rungraj*, left only a daughter, *Auchuma*, who married, and the issue was again an only daughter, *Bencooma*. This daughter also married, and a third time the only issue was a daughter, *Lukhipria*. And, according to the Plaintiff's case, this curious coincidence was again repeated by *Lukhipria* having an only daughter, called *Kedro Bibi*, who married *Lukhun Acharji*, the great grandfather of the Plaintiff's husband. There has been much contention whether, as the Plaintiff asserts, these four daughters succeeded each other as sebaits, or whether, as the Defendant *Gopal*

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asserts, their husbands were the sebaits. The Subordinate Judge takes the latter view. He thinks that in each case the sebait for the time being selected his successor and married his daughter to him. On the other hand, there is, undoubtedly, evidence that the daughters in some cases continued to hold possession of the 'guddi' after the death of their husbands. This was certainly so in the case of *Lukhipria*, who is said to have held the 'guddi' nearly sixty years; and this seems inconsistent with the notion that the daughters had no independent title. But this, at least, is certain, that the succession has not followed the ordinary rules of inheritance under Hindu law. Whether the husbands or the wives were sebaits, neither, after the first generation, could claim by inheritance. There is no pretence that the husbands were heirs to each other, or to *Rungraj*, and the daughter of a daughter is not an heir, except in certain classes of 'stridhun.' *Lukhipria* herself was no heiress, nor was her mother, *Bencooma*, nor was her daughter, *Kedro Bibi*. The Hindu law of inheritance, for which the Plaintiff contends, does not explain the devolution of the office in either of the two lines contended for.

"There is, no doubt, very considerable difficulty in ascertaining what is the true rule of succession to this office. Probably it has hitherto been disposed of in a manner which has been generally approved of by all parties concerned. It is sufficient for us to say, that the evidence does not, in our opinion, establish the Plaintiff's right to succeed under the Hindu law of inheritance."

Cowell, for the Appellant, contended that as no rule of succession had been prescribed by the founder of the sebaitship, the office of sebait descended from the original grantee, and from each holder, according to the rules of the Hindu law of inheritance, subject to usage; and that no usage had been proved which could defeat the Appellant's claim. Where by the terms of the grant the sebait leads a family life, the presumption of law is that the office is descendible in the family according to the ordinary rules of inheritance, and some rule or usage must be proved which contravenes it. Here there have been one or more breaks in the regular course of legal descent from the original founder,

but the four last descents have been in strict accordance with the law of inheritance from an ancestor in possession, and to whom, in default of a legal title, a fresh grant from the heirs of the founder must be presumed. Reference was made to *Strange's* Hindu Law, vol. i. p. 151; to a note of *Colebrooke* in *Strange's* Hindu Law, vol. ii. p. 269; *Mayne's* Hindu Law, § 364: *The Tagore Case* (1); *Rajah Chundernath Roy* v. *Kooar Gobindnath Roy* (2); *Chuttersein's Case* (3); *Mussamat Jai Bansi Kunwar* v. *Chattar Dhari Singh* (4); *Ramalinga* v. *Perianayagum Pillai* (5); *Greedharee Doss* v. *Nundokissore Doss* (6); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (7).

C. W. Arathoon, for the Respondent, contended that on the evidence a woman could not hold the office for want of sufficient qualification; still less that a childless widow could. No case has been cited to shew that the Hindu law of inheritance is applicable to an office of this kind. The evidence established that no one except the Raj guru became the mohunt. The right of appointment and confirmation was inherent in the founder; if that is not so the office is elective: *Madho Das* v. *Kamta Das* (8). A family arrangement here constituted the election. The Respondent is in possession, and the Appellant has not proved any usage or rule under which she is entitled.

Cowell replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellant in this case brought a suit to recover possession of certain properties which she alleged in the plaint to be partly brahmuttar and partly debuttur, the latter being dedicated to certain deities of the names of *Keshub Roy* and others, and also for the possession of the deities themselves from the hand of the first Defendant, *Sri Gopal Acharjia Goswami*. Although the Plaintiff described part of the properties claimed as her own

(1) Law Rep. Sup. Vol. p. 65.
(2) 11 Beng. L. R. 86.
(3) 1 Sel. Rep. 180.
(4) 5 Beng. L. R. 181.
(5) Law Rep. 1 Ind. Ap. 209.
(6) 11 Moore's Ind. Ap. Ca. 428.
(7) 12 Moore's Ind. Ap. Ca. 523.
(8) Ind. L. R. 1 Allah. 539.

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brahmuttur, which had devolved upon her by right of inheritance, it appeared on the hearing before the first Court, and was admitted by both parties, that the whole of the properties claimed belonged to the deities.

The Plaintiff's case was that the properties were in the possession of *Lukhun Acharjia Goswami* as sebait of the idols; that he having no son of his body, took the Plaintiff's husband *Bejoy Lukhun Acharjia*, in adoption, and died in October or November, 1859; that *Bejoy Lukhun* being then a minor, his mother took possession of the properties on his behalf, the right of sebaitship having devolved upon him in the same way as any other property of the deceased would have devolved upon him by right of inheritance; that the idols were established by a remote ancestor of her husband, and the right had devolved from one person to another, following the rule which governs the succession of an ordinary heritable property.

The Plaintiff further alleged that the mother remained in possession, on behalf of her minor son, up to 1863, when he died, and the right of sebaitship devolved upon the Plaintiff, as his widow, but she being then a minor her mother-in-law managed the deb-sheba for her up to the time of her death, which occurred in March, 1864; that upon the death of her mother-in-law, the first Defendant *Gopal Acharjia*, one of the Respondents in this appeal, who was the natural father of *Bejoy Lukhun*, attempted to take possession of the properties along with the deb-sheba, and was opposed on her behalf by her father and maternal uncle, the second and third Defendants and also Respondents, and that a compromise was effected between them, which the Plaintiff sought to set aside as collusive. As the father and uncle do not appear to have had any legal authority to act as the Plaintiff's guardians, and the compromise has not been relied upon, it is unnecessary to notice it further.

The defence of *Gopal Acharjia* was, that the suit was barred by the law of limitation; that the adoption of the Plaintiff's husband was not valid according to Hindu law; that the Plaintiff, being a female, was not competent to perform the duties which ordinarily devolve upon a sebait, and to fill the office; and that, according to the usage of the family, and the rules regulating the appoint-

ment of mohunts to the gaddi, he was entitled to succeed to the deb-sheba estate on the death of *Bejoy Lukhun*, and the Plaintiff had no right whatever; that originally the deb-sheba was founded by an ancestor of the present Rajah of *Panchkote*, and the title of sebait was not complete unless he was confirmed in his appointment by the Rajah of *Panchkote* for the time being, and that Rajah *Nilmoni Sing Deo*, the present Rajah, had made the confirmation in his favour. Rajah *Nilmoni Sing Deo* was added as a Defendant, and put in a written statement to the same effect as the last allegation.

The first Court decided the question of limitation in the Plaintiff's favour, and the Defendants did not appeal from that decision. It then found that the Plaintiff's husband *Bejoy* was duly adopted by *Lukhun Acharjia*, and the customary ceremonies of adoption were performed, but that, he being the eldest son of *Gopal Acharjia*, his adoption by *Lukhun* was invalid.

The suit was dismissed, and the Plaintiff appealed to the High Court, which held that the Lower Court was wrong in holding that the adoption of the Plaintiff's husband was invalid by reason of his having been the eldest son of his natural father; but upon the question whether the Plaintiff was entitled upon the death of her husband to succeed as sebait, the Court held that although there was no satisfactory evidence that the appointments of sebait had been made by the Rajah of *Panchkote*, the evidence did not establish the Plaintiff's right to succeed under the Hindu law of inheritance. The appeal was therefore dismissed.

The Plaintiff has appealed to her Majesty in Council, and it has been contended on her behalf that, in the absence of prescribed rules or usage, the ordinary law of inheritance applies.

It appears to follow from the judgments of their Lordships in *Greedharee Doss* v. *Nundokissore Doss Mohunt* (1), *Rameswarem Pagoda* (2), and *Rajah Vurmah Valia* v. *Rajah Vurmah Mutha* (3), that when, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage.

(1) 11 Moore's Ind. Ap. Ca. 428. (2) Law Rep. 1 Ind. Ap. 209.
(3) Law Rep. 4 Ind. Ap. 76, see p. 83.

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The greater part of the villages in dispute were dedicated to the idols more than a century ago by the then Rajah of *Panchkote* or *Pachete*, and from time to time other villages have been added to the endowment. The first sebait was *Rungraj Goswami*, who left an only daughter, *Auchuma*, who married, and had issue an only daughter, *Bencooma;* she married, and her only issue was a daughter, *Lukhipria*, and according to the Plaintiff's case *Lukhipria* had an only daughter, *Kedro Bibi*, who married *Lukhun Acharjia*, and had a son, *Srinibash*, the grandfather of the Plaintiff's husband. The Plaintiff asserted that the four daughters succeeded each other as sebaits; the Defendant *Gopal* on the contrary asserted that their husbands were the sebaits. It appeared, however, that *Lukhipria* held the "guddi" for nearly sixty years, her husband having died first, which is inconsistent with the latter contention. Now, whether the four daughters succeeded each other or their husbands were the sebaits, the succession was not according to Hindu law, as a daughter's daughter is not an heir except in certain cases of stridhun, and a son-in-law has no right of succession. There is, no doubt, considerable difficulty in ascertaining what is the rule of succession to this office, but it is certain that the usage has not been according to the ordinary rules of inheritance under Hindu law. Not only does the usage not support the Plaintiff's claim, but it is opposed to it. It is not for their Lordships to consider whether there is any infirmity in the title of the Respondent *Gopal*, who has been in possession many years, with the consent if not by the appointment of the Rajah. The Plaintiff being out of possession must recover upon the strength of her own title, and not on the weakness of that of the Defendant. Their Lordships have, therefore, only to consider whether the Appellant has made out her title, and they are of opinion that the High Court was right in holding that she had not. They will humbly advise her Majesty to confirm the judgment of the High Court and to dismiss the appeal. The costs will be paid by the Appellant.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitor for Respondent: *T. L. Wilson.*

OMRAO BEGUM AND ANOTHER . . . . PLAINTIFFS;

AND

THE GOVERNMENT OF INDIA AND OTHERS DEFENDANTS.

J. C.*
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Nov. 28.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Nawab Nazim's Debts Act (XVII. of 1873), s. 12—Construction—Power of Commissioners.

The power of the Commissioners under sect. 12 of the *Nawab Nazim's Debts Act* (XVII. of 1873) is not controlled by the preamble; and a suit cannot proceed to recover any property which they have decided is held by the Government for the purpose of upholding the dignity of the Nawab.

APPEAL from a judgment of the High Court (April 26, 1880) affirming a decree of the Judge of *Moorshedabad* (May 29, 1878) which dismissed the suit of the Appellants.

Both Courts held that the suit was such that it could not proceed unless the Nawab Nazim of *Bengal* were made a party Defendant to it, and that as the Government of *India* had refused their sanction to his being so made, as required by the *Nawab Nazim's Debts Act*, 1873, the suit must necessarily be dismissed.

The facts of the case are as follows:—

The Appellants are the daughters and heiresses to seven-eighths of the property of one *Syed Mehdi Ali Khan*, deceased, who was the step-brother of *Amirunnissa* Begum, also deceased. *Amirunnissa* was the widow of Nawab *Ally Jah*, the grand-uncle and immediate predecessor of the Nawab Nazim of *Bengal*. As such widow she received a large stipend, out of which she purchased various properties, including pergunnah *Gopinathpore*, in the name of her half-brother *Mehdi Ali Khan*, but really for her own exclusive use and benefit. She died on the 21st of January, 1858, and the Nawab, by virtue of an established custom that the Nawab Nazim for the time being was heir to all the Begums of the family, took possession of the properties so purchased by her, including *Gopinathpore*. *Mehdi Ali Khan* made no claim to the property in

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his own right, but presented a petition to the Nawab Nazim, praying for maintenance, which was granted. On the 24th of February, 1858, *Mehdi Ali Khan* executed a deed of renunciation, whereby he disclaimed all right to the estate of the Begum *Amirunnissa*, and on the same day the Nawab granted to him a purwannah, which declared that "His Highness should grant to *Mehdi Ali Khan* and his heirs, from generation to generation, Rs.600 per month, upon condition that he should always remain submissive to the Nazim and never depart from his arrangement."

Mehdi Ali Khan died on the 4th of January, 1865, and on the 2nd of March the Deputy-Magistrate made an order under sect. 318 of the *Criminal Procedure Code*, placing his heiresses, including the Appellants, in possession of *Gopinathpore*. The Nawab Nazim commenced a suit to recover the property in 1867. His rights were affirmed by both Courts in *India*, and their decisions were affirmed by Her Majesty in Council, in 1875.

On the 11th of February, 1869, the Nawab Nazim made a gift of all the properties which he had inherited from *Amirunnissa* Begum, including *Gopinathpore*, to his second son, the second Respondent in this appeal.

Except a sum of Rs.2000 no payments of the allowance of Rs.6000 were made by the Nawab, owing, as the Judicial Committee remarked, to the fact "that *Mehdi Ali* and his representatives subsequently repudiated the arrangement." The Appellants sued him in O.S. 101 of 1870 for recovery of the estate of *Amirunnissa* and for arrears of maintenance, and obtained a decree for Rs.18,900, which was confirmed by the High Court in R. A. 218 of 1872. The claim for the property was dismissed.

The Appellants preferred a claim before the Commissioners for Rs.50,000, being the arrears of maintenance awarded by the High Court, and further maintenance, but this claim was rejected by the Commissioners on the 2nd of January, 1875. This award was confirmed by them, on review, on the 28th of July, 1875.

On the 10th of May, 1875, the Commissioners made a declaration, under sect. 12 of Act XVII. of 1873, whereby they certified that all the properties of which the Nawab Nazim took possession as heir of *Amirunnissa* Begum, including *Gopinathpore*, became an

appanage of the office and state of the Nawab Nazim, which he could not relinquish or convey to any other person. And that the properties in question were held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim.

The Appellants then applied to the Government of *India*, under sect. 11 of the Act, for leave to execute their decree against the property of the Nawab Nazim. This application was refused on the 26th of May, 1876, and thereupon the Appellants brought a suit on the 5th of May, 1877, in the District Court of *Moorshedabad*, against the Government and the second son of the Nawab Nazim, and thereby prayed for payment of Rs.60,969, being the arrears of maintenance decreed by the High Court, with further arrears up to date, or in lieu thereof for a return of certain property, including the pergunnah of *Gopinathpore*. The plaint stated, in effect, that *Mehdi Ali Khan* was the lawful heir of all of *Amirunnissa* Begum's property. That he surrendered his right to it in consideration of the monthly allowance of Rs.600. That this allowance thereupon became a charge upon the whole of the property, including *Gopinathpore*, which bound it in the hands of every person to whom it passed, and that upon the non-payment of the allowance the Plaintiffs had their choice of enforcing payment against *Gopinathpore*, or of recovering the pergunnah itself. The Nawab Nazim was not made a party to the suit.

Both Defendants filed answers, and the Government especially set up as their first plea, that, "as the present Nawab *Nazim* has an interest in the property, the subject-matter of the present suit, the Plaintiffs should have made him a party."

On the 4th of October, 1877, the Court framed various issues, and decided upon the first issue that the Nawab ought to be made a party, and directed the Plaintiffs to apply to the Government of *India* for the necessary permission.

On the 18th of February, 1878, the Government of *India* replied to the Plaintiffs' application by refusing permission to make the Nawab Nazim a party to the suit.

Both Courts thereupon dismissed the suit as stated above.

Doyne, for the Appellant, contended that this dismissal was wrong. The question is whether the Nawab Nazim should have

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been made a party; as regards the merits, all the documents have been withdrawn from the record, leaving the question of parties the sole one for decision. Reference was made to Act XVII. of 1873 and its preamble. Did the property descend to the Nawab, and if it did, was it Nizamut property or the Nawab's own property? It was contended that the latter alternative was correct; that the Commissioners' finding was *ultrà vires*, and had therefore nothing to do with the question; and that the Nawab having parted with his entire interest in the property was not a necessary party to the suit. The question resolved itself into one concerning the jurisdiction of the Commissioners.

Graham, Q.C., and *J. D. Mayne*, for the Respondents, the Government of *India*, were not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This was an action brought by *Omrao* Begum and *Yohura* Begum, daughters of the late *Syed Mehdi Ali Khan*, against the Government of *India* and the second Defendant, who is called for shortness *Amir Saheb*, for the recovery of certain arrears of an allowance, or, in lieu thereof, possession of certain immovable property. There is also a claim that the allowance may be charged upon this property, and that if it be not paid the property be sold for the purpose of payment.

The facts necessary to the decision of this case may be shortly stated. *Mehdi Ali Khan* was a half-brother of *Amirunnissa*, who was the widow of the grand-uncle and predecessor of the present Nawab Nazim of *Bengal*. A certain estate of *Gopinathpore* had been purchased by her, benami in the name of *Mehdi Ali*, but really for herself. Upon her death the Nawab Nazim claimed, by a custom of the family, all her property. *Mehdi Ali*, the father of the Plaintiffs, raised some question upon this subject, and made some claim to the property himself. But he withdrew his claim upon an agreement which is to be found in a perwannah, not before their Lordships, to the effect that he was to receive Rs.600 per month, and in consideration thereof to forego any claim he might have, and not to molest the Nawab Nazim for the future.

It seems that, notwithstanding the agreement, he took possession of the property, whereupon the Nawab Nazim was put to a suit which finally came before this Board, and in which this Board decided that he was entitled to recover possession of the property in dispute, mainly upon the strength of the agreement, which agreement prevented the Defendant from disputing his title. In the Courts of *India* a suit was brought by the Appellants against the Nawab Nazim, to recover, amongst other things, the arrears of the allowance granted to *Mehdi Ali Khan;* and a judgment for some Rs.18,000 was obtained in December, 1873, about a month after the passing of the Act called the *Nawab Nazim's Debts Act,* on which the question in the present case turns.

The Government of *India* plead, among other things, that the suit could not proceed because the Nawab Nazim was not made a party to it. Whether they are right or wrong in that contention depends upon the construction of the Act which has been referred to—an Act to provide for the liquidation of the debts of the Nawab Nazim of *Bengal,* and for his protection against legal process. The object of this Act was, as stated in the preamble, to put a stop to various suits, to ascertain what property with respect to which there had been some disputes was or was not held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim, and for the purpose of exempting him for the future from being sued in the Courts. This Act appointed certain Commissioners for the purpose of determining what claims or debts were enforceable against the Nawab Nazim, and how much it was equitable to pay in respect of them, and gave them this jurisdiction without their being bound by any previous agreement or judicial proceeding; and then it proceeded, by sect. 12, to enact thus:—"The Commissioners shall ascertain what jewels and immovable property are held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim for the time being, and shall certify the particulars of such jewels and property; and their finding thereon shall be binding and conclusive on all persons whomsoever."

The contention on the part of the Appellants has been that, the Nawab Nazim having, as it is admitted, executed a conveyance of this property of *Gopinathpore* to the second Defendant, his son, in

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the year 1859, it was not what may be called Nizamut property, and that the Commissioners had no jurisdiction to deal with it or to declare it to be Nizamut property. But it has been very properly admitted on the part of Mr. *Doyne* that if they had such jurisdiction, and if they rightly declared it to be Nizamut property, then the suit cannot proceed.

Their Lordships are of opinion that the power of the Commissioners under sect. 12 is by no means controlled, as it has been contended, by any words in the preamble, but must be construed according to the plain meaning of the language; and that language is that the Commissioners are to ascertain "what jewels and immovable property are held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim." Whether this property had been conveyed to the son; whether the conveyance was valid; whether it was voluntary; whether it was collusive; or whether it was revocable—all these were questions which would come under the jurisdiction of the Commissioners to decide; and they have held that this property was immovable property held by the Government for the purpose of upholding the dignity of the Nawab. Their Lordships have no doubt that was within the jurisdiction of the Commissioners; and if so, as has been very properly admitted, the suit cannot proceed, and the judgment of the High Court was right.

Under these circumstances, their Lordships will humbly advise Her Majesty to affirm that judgment; and this appeal will be dismissed with costs.

Solicitors for Appellants: *Wrentmore & Swinhoe.*

Solicitor for Respondents, the Government of *India*: *H. Treasure.*

AHMUD HOSSEIN KHAN . . . . . DEFENDANT;

AND

NIHALUDDIN KHAN . . . . . PLAINTIFF.

J. C.*
1883
March 16.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF FYZABAD DIVISION, OUDH.

Res judicata—Limitation—Maintenance.

An order dismissing a personal claim against a father for maintenance founded on an ikrarnama does not bar a suit by the same Plaintiff, after the father's death, against an elder brother, to recover maintenance as a charge upon the paternal estate.

Such suit can be brought under Act XV. of 1877 within twelve years from the date when the cause of action arises.

APPEAL from a decree (Jan. 30, 1879) of the Commissioner of *Fyzabad*, confirming a decree (June 1, 1878) of the Deputy Commissioner of *Lucknow*, whereby the Respondent's suit (March 5, 1878) was decreed with costs.

J. H. Arathoon, for the Appellant.

C. W. Arathoon, for the Respondent.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is a suit between two brothers, the sons of *Mahomed Hossein Khan*, who died in November, 1863. The Plaintiff in the suit, the Respondent before their Lordships, was the second son of *Mahomed Hossein Khan*, and the Defendant, the Appellant, was the elder son. It appears that upon the death of their father there was considerable litigation between the brothers with regard to the right to the estate of the father. That litigation began in 1863, and the result of it was that the Defendant, the

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Appellant, was declared to be entitled to the estate. After that the Respondent brought a suit against his brother in which he claimed to recover Rs.19,600 for arrears of maintenance for eleven years and eight months, viz., from the 1st of July, 1866, to the end of February, 1878, at Rs.140 a month, and a declaration of his right to maintenance in perpetuity, and to have it judicially declared that the maintenance was a debt due from the estate of *Kalispur*, situated in the *Lucknow* district, as also from *Mamni* and *Motka*, being the estates which the Defendant had recovered by means of the litigation. He appears to have fixed the 1st of July, 1866, for the beginning of this claim for maintenance, and claimed arrears from that date, as being the day on which he was himself dispossessed of the estate and the Defendant got possession of it. His case was that he was legally entitled to maintenance at the rate of Rs.140 a month from the estate of his deceased father; and in his plaint he founded his claim upon an order of the Deputy Commissioner of *Lucknow* in a suit between the father and *Mussumat Bibi Fatima*, his grandmother, and the present Defendant, who was the Plaintiff in that suit. He also said that he was dispossessed of the property under an order dated the 29th of June, 1865, which was upheld by Her Majesty in Council. The Defendant, by his written statement, set up various answers to the claim. The material defences were that the Plaintiff was not entitled to any maintenance as the son of *Mahomed Hossein;* that the claim was barred by limitation, as the Plaintiff himself said that he had not received maintenance since September, 1863, and that the Defendant was not bound by the document which was filed by *Bibi Fatima*, being a document alluded to in the plaint, nor by any document filed by *Mahomed Hossein;* and lastly, in the 11th paragraph of his written statement, he alleged that the claim was barred by the fact of its being *res judicata*. Issues were settled which raised what are the substantial questions between the parties, and they were: 1, Is the suit barred by *res judicata?* 2. Is the suit barred by limitation? and 3 and 4, which may be taken together: Was the Plaintiff entitled to the maintenance, and if so at what rate, and from whom? Both the Lower Courts have made decrees in favour of the Plaintiff, and the Defendant has appealed to Her

Majesty in Council from the decree of the Commissioner which affirmed the decree of the First Court.

With regard to the first question, whether the suit was barred by *res judicata*, the document which is relied upon by the Defendant appears to be an order made in a suit brought by the Plaintiff against *Mahomed Hossein* the father in which he claimed to be entitled to a monthly allowance for maintenance founded on some ikrarnama, which would appear to have been executed by the grandmother, who had the management of the property in consequence of *Mahomed Hossein* being incapable of taking care of his affairs. That is clearly not an order which would be *res judicata* in the present suit. It was not an adjudication between these parties but between the Plaintiff and his father, and it was altogether upon a different sort of claim. There is no ground for saying that the Lower Courts were wrong in deciding against the Defendant upon that issue.

Another question was raised which perhaps it may be well for their Lordships to notice. It was said that, there being an agreement, which will be presently mentioned, and which was put in as evidence on behalf of the Plaintiff, a suit should have been brought upon that and not in the present form. If there had been ground for this objection, it might and should have been taken when the Defendant appealed to the Commissioner. It was said that he could not know of the objection when the written statement was filed, because the agreement was produced for the first time at the hearing of the cause when evidence was given, and it had not been filed; but after the hearing, and after the production of the agreement, the Defendant knew perfectly well that it was being used against him, and when he made his appeal to the Commissioner he could have taken this objection. If there is any ground for the objection it cannot be taken in the present stage of the proceedings.

The next question, in the order in which the issues were framed, is the law of limitation; but perhaps it will be better first to consider the other, which is the main question in the case, and which arises upon the third and fourth issues, namely, whether the Plaintiff is entitled to receive the maintenance.

The lower Courts have come to this conclusion upon that ques-

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tion: As to his being entitled to receive the maintenance. The officiating Deputy Commissioner says:—"Moreover it appears to me that the Defendant, as maafidar, merely takes that estate in trust, subject to the rent-charges, and that he is bound to pay the stipends with which the estate is charged. Sanad or act of Government does not absolve him from this charge. As regards Plaintiff's right to the allowance claimed, there is, in my opinion, no doubt; the documentary evidence referred to and filed fully establishes this fact, that the cadets of the family were assigned certain specified allowances, payable to them from the estate by the eldest male member managing the estate." The Commissioner says, "Regarding the payment of the allowance, I consider the evidence in the file of the lower Court amply sufficient. It clearly establishes that the cadets of the family were assigned certain allowances payable to them from the estate by the eldest uncle in possession." There is this finding of both the Courts to the effect that the allowance for maintenance was charged upon the estate; and there is evidence in the case upon which they might well come to that conclusion.

It appears that in December, 1869, the parties came to an agreement. The Defendant's part of agreement states, "That *Mohammad Nihaluddin Khan*"—that is, the Plaintiff—"has waived his claim in succession of the estate, and, having filed a registered deed of compromise (razinama) in Court, has caused the suit to be withdrawn. That for his personal expenses I have fixed an allowance of Rs.75 per mensem for a term of one year, and then for the next six years Rs.100 a month; and as at present I am very much in debt, owing to the law expenses incurred, so much so that many of my maafi (revenue-free) villages are mortgaged and hypothecated, and the estate yields very little profits, I cannot afford at present to pay the old allowance of Rs.140 per mensem to *Mohammad Nihaluddin Khan*. But after the expiration of the aforesaid term of seven years I shall continue to disburse the old pay of Rs.140 a month in perpetuity. If at any time I may offer any objection or hesitate in paying up each of three descriptions of monthly allowances, *Mohammad Nihaluddin Khan* will be at liberty to realize the same by a suit in Court. If for my own necessity I may mortgage or hypothecate the maafi

villages, so that the property left may be insufficient to meet the monthly allowance fixed, I will in that case pay the said allowance out of the estate *Khalispur Ameliha.*" And there is a corresponding agreement, of the same date, by the Plaintiff, which recognises this agreement. This document was put in by the Plaintiff, and formed a very important part of the evidence in support of his case. Besides that, there was evidence of some previous proceedings with reference to this estate and the allowances for maintenance, in which there was a report of the Extra Assistant Commissioner of *Lucknow* made under the order of the Deputy Commissioner, stating that, in the opinion of the Extra Assistant Commissioner, it was proved that the parties mentioned received the allowances shewn opposite to their names. There is mentioned the name of "*Nihalooddeen Khan*, Rs.140," which would seem to be the allowance that was at one time paid. Their Lordships think that the Lower Courts, with this evidence before them, were quite justified in finding that the Plaintiff was entitled to an allowance for his maintenance as a charge upon the property which had come from the father, *Mahomed Hossein Khan.* If that is the case, the plea of the law of limitation is answered, because it is shewn that the maintenance was a charge upon the property, and twelve years is the term which is applicable to the suit. The Plaintiff only seeks to recover arrears from the 1st of July, 1866, which is within the twelve years. Therefore the issue raised as to the law of limitation was properly found against the Defendant.

But there remains this question: although it would appear that at one time Rs.140 had been paid monthly for the maintenance, when the parties came to the agreement which has been read, in consequence apparently of the state of the property, the Plaintiff was willing to receive less than the Rs.140 for a part of the time. It was then arranged that Rs.75 should be paid from the date of that agreement for the year 1870; that Rs.100 should be paid up to the 14th of December, 1876, and after that time that the Rs.140 should be paid. Now the Plaintiff's case was mainly supported by this agreement, exhibit A: it was put forward at the outset of the case as his evidence by the pleader who appeared for him; and it does seem right that he ought not to be allowed to

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recover more than he agreed by that document to receive. If he had had to sue upon the agreement he could only have recovered that. He has sued in a different way; but their Lordships are of opinion that this is all that he ought to recover in the present suit.

The consequence will be that their Lordships will humbly advise Her Majesty that the decree which has been made in the Plaintiff's favour by the lower Courts should be altered by giving to the Plaintiff the arrears, calculated in the manner provided for in the agreement, with interest upon those arrears from the date of the decree at the same rate as has been given by the lower Courts upon the sum which they awarded. The decrees of the lower Courts as to the costs will stand, and with regard to the costs of this appeal the Respondent has really substantially succeeded in it. The objections of law which were taken by the Appellant, and without which he would have had no right of appeal, have entirely failed, and their Lordships therefore think that the Appellant ought to pay the costs of the appeal.

Solicitor for Appellant: *T. L. Wilson.*
Solicitor for Respondent: *H. Earle.*

KUMAR TARAKESWAR ROY . . . . . PLAINTIFF;

AND

KUMAR SHOSHI SHIKHARESWAR . . . DEFENDANT.

AND CROSS APPEAL.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Construction of Will—Estate of Inheritance—Accrued as well as Original Share passes by Gift over.

A Hindu by will gave to his three nephews certain estates "for payment of the expenses of their pious acts." The gift was in these terms:—

"The said three nephews shall hold possession of the same in equal shares and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale; but they, their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall see fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid) then his share shall devolve on the surviving nephews and their male descendants, and not on their heirs."

In a suit by the surviving nephew against the infant son of the testator, *held*, on the authority of the *Tagore Case*, that a life estate only was created in favour of the three nephews. The attempt to create an estate of inheritance in their favour failed; since to exclude females from the succession was to exclude the legal course of inheritance:—

Held, further, that on the death of the first nephew his share went to the other two, and that on the death of the second the share which he left behind him made up of his original and his accrued share went to the Plaintiff.

APPEALS from a decision of the High Court (Sept. 9, 1880) modifying a decree of the First Subordinate Judge of zillah *Rajshahye* (May 2, 1878).

The suit was brought by the Appellant on the 27th of January, 1877, to recover possession of the properties in suit as the survivor of the three brothers, the nephews of the testator. The Respondent, the son of the testator, besides disputing the genuineness of the will, contended that the gift on which the Appellant relied

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was void, or that it only entitled him to a life interest in one-third of the property claimed.

The facts of the case and the clause of the will containing the gift in question appear in the judgment of their Lordships.

The judgment of the High Court (*Garth*, C.J., and *Romesh Chunder Mitter*, J.), so far as material to the questions in this appeal, was as follows:—

"The next question is, what are the rights of the contending parties under the 8th clause with reference to the talooks in suit. The gift, in the first place, is to the three brothers, including the Plaintiff, and to their succeeding generations in the male line. There is this further condition, that should any of the brothers die without leaving a male child, then his share shall devolve on his surviving brother or brothers and their male descendants.

"We are opinion that the condition imposed upon the gift, that its subject-matter should devolve on male descendants only, is invalid. In *Jotendra Mohun Tagore* v. *Gyanendra Mohun Tagore* (1) the Judicial Committee observe: 'It follows strictly from this, that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs.' Further on they say: 'If, on the other hand, the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift

(1) 9 Beng. L. R. 377.

attempts to confer, and that state of inheritance which it confers is void.'

"Applying the principle enunciated in these observations to the terms of the will in this case, it is clear that under the bequest the three brothers, including the Plaintiff, received the talooks in equal shares for their respective lives, and that the course of succession which was subsequently indicated by the testator being contrary to Hindu law, the particular estate of inheritance which he attempted to create was void.

"Therefore on the testator's death a one-third share of the eight annas of the talooks in suit devolved upon the Plaintiff, enjoyable by him for his life, and the remaining two-thirds in equal shares devolved upon his two brothers, enjoyable by them in equal shares for their respective lives.

"But then these brothers died, one after the other, without leaving any male issue. *Kumar Sibeswar* died first, on the 5th Kartick 1276 (October, 1869), leaving him surviving the Plaintiff and his elder brother *Kumar Jagadiswar*. On the happening of such a contingency as this, the will provides that the share bequeathed to the deceased was to devolve upon the surviving brothers and their male descendants. This latter limitation, being contrary to Hindu law, is void. But the gift over to the surviving brothers is not invalid according to Hindu law (see *Sreemutty Soorjeemony Dossee* v. *Denobundoo Mullick* (1) and the observations of the Judicial Committee upon that case in *Tagore* v. *Tagore* (2).

"For similar reasons, upon the death of *Kumar Jagadiswar* without leaving any male issue, his original share (viz., one-third) devolved upon the Plaintiff. It is somewhat doubtful whether, along with *Jagadiswar's* original share (viz., one-third), the share received by him on the death of *Sibeswar*, also did not pass to the Plaintiff. But having regard to the provisions relating to the legacy as a whole, we think that it was the intention of the testator, that the whole augmented share should pass to the Plaintiff, who was the sole surviving brother. The language used relating to this gift over to the surviving brother or brothers is not inconsistent with this intention.

(1) 9 Moore, Ind. Ap. Ca. 134. (2) 9 Beng. L. R. 399, 400.

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"We therefore come to the conclusion that the whole eight annas share of the two talooks, the subject-matter of this suit, has devolved upon the Plaintiff under the provisions of the will of Rajah *Chunder Shikhareswar*. But we do not agree with the Lower Court that the Plaintiff's right thereto is absolute. His interest will determine with his death, and upon the happening of that event the disputed share of the talooks in question will revert to the legal heir of the testator.

"In modification of the decree of the Lower Court, we decree the possession of the disputed share of the two talooks, which is the subject-matter of the suit, and declare that the Plaintiff has therein only a life interest. We do not interfere with the decree of the lower Court as to mesne profits; but, under the circumstances of the case, we think that each party should bear his own costs in this as well as in the Lower Court."

Doyne, and *C. W. Arathoon*, for the Appellant, contended that the Appellant was entitled under the clause in question and in the events which had happened to an absolute interest in the whole of the properties in suit. The validity of the gifts over in favour of the survivor on which the title of the Appellant to the whole depends is clear, for the donees were in existence and capable of taking at the time of the gift: see *Soorjeemony Dossee* v. *Denobundoo Mullick* (1); the *Tagore Case* (2). As regards the *quantum* of the Appellant's estate in the whole of the properties, the question is whether the testator intended something contrary to the Hindu law. If he did he became intestate as to that only, but not further: see *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (3); *Ram Lall Mookerjee* v. *Secretary of State* (4). It is distinguishable from the *Tagore Case* because there the gift was of a life estate in express terms. Here the gift is in terms of an estate of inheritance. In remote contingencies there are directions that the estate shall devolve otherwise than according to Hindu law. Those directions it was submitted could be struck out. The intention of the testator to give an absolute estate is

(1) 9 Moore, Ind. Ap. Ca. 135.
(2) 9 Beng. L. R. 377; Law Rep. Ind. Ap. Sup. Vol. 47.
(3) Law Rep. 5 Ind. Ap. 138.
(4) Law Rep. 8 Ind. Ap. 46.

not to be defeated and the whole disposition prior to the invalid one held void. Because a bad limitation follows a good one that is no reason for striking out the good one. The intention of the testator should be effectuated by striking out the bad one.

Mayne, and *Woodroffe*, for the Respondent, contended that here was an obvious intention to create an estate in tail male, not so flagrant a one as in the *Tagore Case*. It cannot succeed, being contrary to the principle laid down in that case. It is not exactly tail male, it would be gavelkind tail male. But it excludes the legal course of inheritance. It is an attempt to create an estate of inheritance in a manner unknown to Hindu law, and it operates therefore simply as a gift for life. There is no authority for taking the good limitations and rejecting the bad. That would be to pass the estate in a manner different from that contemplated by the testator, in other words to make a will for him. As that cannot be done, there is an intestacy on the expiration of the life interest: the *Tagore Case* (1).

Secondly, as to whether the Appellant has a life interest in the whole or one-third, that depends upon the effect of the gift over. It was contended that on the death of two of the nephews the survivor was only entitled to a life estate in one-third of the properties in suit. The gift over is to a class, as for instance, on the death of the second nephew the third nephew and the male descendants of the first would take. Therefore there results a failure of the gift over, both at the death of the first and of the sscond, because some of the class could not take: see *Leake* v. *Robinson* (2). [LORD BLACKBURN referred to *Pearks* v. *Moseley* (3).] This doctrine has been acted on in *India*. [*Doyne* referred to the *Hindu Wills Act* of 1870 adopting in part Act X. of 1865]. But see *Srimati Bramamayi Dosi* v. *Jages Chandra Dutt* (4); *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (5); *Kherodemoney Dossee* v. *Doorgamoney Dossee* (6).

Doyne replied.

(1) 4 Beng. L. R. O. C. J. 179.
(2) 2 Mer. 363.
(3) 5 App. Cas. 714.
(4) 8 Beng. L. R. 400.
(5) Ind. L. R. 2 Calc. 262.
(6) Ind. L. R. 4 Calc. 455.

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March 17. The judgment of their Lordships was delivered by SIR ROBERT P. COLLIER:—

The question in these appeals arises upon the construction of a clause in a Hindu will, which is in these terms:—

"My brother's sons, *Kumar Jagadiswar Roy*, *Kumar Tarakeswar Roy*, and *Kumar Sibeswar Roy*, shall receive, for defrayment of the expenses of their pious acts, the following out of the properties left by me, to wit, my one half share in pergunnahs *Chowgaon* and *Khord Chowgaon*, recorded as No. 278 in the Collectorate of zillah *Rajshahye*, in dehi *Dalil*, and others, appertaining to tuppa *Byas*, and recorded as No. 456, and in mouzah dehi *Gobindpore*, in pergunnah *Santosh*, recorded as No. 96 in the towzi or rent-roll of the Collectorate of zillah *Dinajpore*. The said three nephews shall hold possession of the same in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale; but they, their sons, grandsons, and other descendants in the male line, shall enjoy the same, and shall perform acts of piety as they respectively shall see fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

The facts necessary to be stated are, that the three nephews of the testator were living at his death; that two of them died before the institution of the present suit, one unmarried, the other leaving a widow but no issue; that the suit was instituted by *Kumar Tarakeswar Roy*, the survivor, against the infant son of the testator, represented by *Hurgobind Bose*, appointed manager of the estate by the Court of Wards, to obtain a declaration of title to and possession of half of pergunnahs *Chowgaon* and *Khord Chowgaon*. No question arises as to *Gobindpore* in this suit.

The Plaintiff based his claim on the clause of the will above set out, contending that by its terms an absolute estate was given in undivided shares to the three nephews; that upon the

death of his brothers their shares devolved on him, and he was thus entitled to the whole.

The Defendant denied the execution and validity of the will, both of which issues have been disposed of by concurrent judgments of the Courts against him. He further contended that upon the true construction of the will, which is narrowed to that of the clause in question, the Plaintiff was entitled only to a life estate in one-third of the property devised.

The Court of first instance gave the Plaintiff a decree for his whole claim.

This decree was altered by the High Court, who gave him a life interest only in the whole of the property.

From the judgment of the High Court there are cross appeals.

The first by the Plaintiff, on the ground that he was entitled to an absolute estate in the whole.

The second by the Defendant, on the ground that the Plaintiff was entitled to a life estate in one-third only.

It will be convenient to deal firstly with the first appeal.

The grounds of the judgment of the High Court that the Plaintiff was entitled to a life estate only may be thus shortly stated.

They held, on the authority of *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1), commonly called "the *Tagore Case*," that the testator, having attempted to create an estate of inheritance unknown to and opposed to Hindu law, that estate of inheritance was void, and that the will operated only to confer on the Plaintiff an estate for life.

The *Tagore Case* is so well known, and has been so often referred to by this Board, that it is unnecessary to cite it at length, and it is enough for the present purpose to refer to the following passage:—

"If the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew and the eldest

(1) Law Rep. Ind. Ap. Sup. Vol. 47.

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nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

It is true that the departure from Hindu law in the present case is not as great as in the case supposed in this passage, or as in the *Tagore Case*, where the attempt was to establish what would be called an estate in tail male according to English law. But the attempt to confine the succession to males, to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindu law, "excluding," in the terms of the judgment quoted, "the legal course of inheritance."

It has been contended on the part of the Appellant, that the present case is distinguishable from the *Tagore Case*, on the ground that, in that case, the first estate given was in terms an estate for life; that in the present case, if the words relating to succession, viz., "that their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety, as they respectively shall think fit, for the spiritual welfare of our ancestors," were struck out, the gift would be of an estate of inheritance; and that the intention of the testator to confer an estate of inheritance may be effectuated by striking out so much of the clause above quoted as excludes females from the succession.

Their Lordships are unable to accede to this view.

Considering that the gift to the nephews is expressed as to be received for the defrayment of their pious acts, and that alienation is forbidden, they do not construe the gift, independently of the words prescribing the course of succession, as conferring an

absolute estate. They are further of opinion that to alter the words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator, and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object, expressed in other parts of his will, as well as in this clause, viz., to exclude females.

The case of *Bhoobun Mohuni Debya* v. *Hurrish Chunder Chowdhry* (1) has been cited on behalf of the Appellant, in which the following words of a grant,—"You are my sister; I accordingly grant you a talook for your support . . . . Being in possession of the lands, and paying rent according to the tahut jumma, do you and the generations born of your womb successively (Santán sreni kramé) enjoy the same, no other heir of yours shall have right or interest,"—were construed as conferring an absolute estate, defeasible on the failure of issue living at the death of the donee. In that case the words of gift (of which the original in the native language are given) were held to have no technical meaning, signifying much the same as "children and grandchildren," and indicating an estate of inheritance, while the only words which created a difficulty, "no other heir of yours shall have right or interest," were held to be satisfied by giving them the effect of making the absolute estate defeasible in the event of the failure of issue living at the time of the death of the donee, in which event the estate was to revert to the donor and his heirs. This case has no bearing on the present.

For these reasons they are of opinion that the first appeal should be dismissed.

The second appeal arises on the construction of the concluding paragraph of the clause:—

"If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

Their Lordships construe this clause thus, in accordance with the construction put upon it by both the Indian Courts. "Any of them" means any of the three nephews, not any of their

(1) Law Rep. 5 Ind. Ap. 168.

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descendants; on the death of any of three nephews his share shall go to the surviving nephews or nephew, not to the descendants of a dead nephew; but on the estate getting into the hands of the surviving nephew or nephews, it is to descend, as had been before provided, to males only. This construction disposes of an ingenious argument of Mr. *Mayne*—based on the hypothesis that upon the death of the second nephew his share would go to his surviving brother, and to the "male descendants" of his dead brother—that this would be a gift to a class, some of whom, *i.e.*, the male descendants, could not take, and would therefore, by a well known rule of law, be altogether invalid.

According to the construction which their Lordships adopt, the gift over was to persons alive, and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent, according to the authority of *Sreemutty Soorjeemony Dossee* v. *Denobundhoo Mullick* (1), as explained in the *Tagore Case*. For the reasons above given it could only confer an estate for life.

One point only remains to be considered, which was indeed not argued before their Lordships, but is suggested in the judgment of the High Court, viz., whether upon the death of the brother dying secondly, his original share only, or the share also of his deceased brother which had accrued to him, went over to the surviving brother. It is undoubtedly a rule of English law that, when a fund is given to a class of persons with a direction that, on the death of any of them, their shares are to go over, the original shares only, and not the accruing shares, will go over. This rule was stated by Lord *Hardwicke* in *Pain* v. *Benson* (2), and has been followed, not always without expressions of reluctance, by a long series of decisions.

But an intention that the accruing shall go over with the original shares has been inferred where there is what has been called "an aggregate fund" which the testator desires to keep unsevered (when the gift has been to several with benefit of survivorship) (3), when, in addition to the word "share," the

(1) 9 Moore, Ind. Ap. Ca. 135.
(2) 3 Atk. 80.
(3) *Worlidge* v. *Churchill*, 3 B. C. C. 465; *The Crawhall Trusts*, 8 D. M. & G. 480.

word "interest" is used (1), or where the words are his "or her share or *shares*" (2), so that the application of the doctrine to English wills has sometimes given rise to questions of some nicety. What might have been the effect of the words in question had they been found in an English will, their Lordships think it unnecessary to decide, as they are of opinion that the rule, founded in a great measure on our peculiar doctrine, that the heir-at-law is not to be disinherited but by express words or necessary implication, has no application to the wills of Hindus. It may be observed that such a course of devolution is the ordinary course for Hindu property as between brothers inheriting from brothers, and would present itself most readily to the mind of a Hindu testator; so that, even if the English rule should be applied anywhere beyond the domain of English law, it could hardly be applied to Hindu wills without defeating the intention. Their Lordships feel constrained by no rule of law to read the words in any other than their natural sense, viz., that on the death of the first brother his share goes to his two brothers, and that, on the death of one of these, the share which he had at his death, made up of his original and his accrued share, goes to the surviving brother.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be affirmed, and that both appeals be dismissed.

Solicitor for Appellant: *T. L. Wilson.*
Solicitor for Respondent: *H. Treasure.*

(1) *Douglas* v. *Andrews*, 14 Beav. 347.

(2) *Wilmot* v. *Flewitt*, 11 Jur. (N.S.) 820.

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MOHESH LAL . . . . . PLAINTIFF;

AND

MOHUNT BAWAN DAS . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mortgage—Extinction of Charge.

Whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties; but *held* that it must be presumed, in the absence of an expressed intention to the contrary, that when one, claiming to be absolute owner of an estate, borrows money to pay off a mortgage, there being no intermediate incumbrance, he intends to extinguish it.

APPEAL from a judgment of the High Court (Aug. 22, 1879) reversing a decree of the Subordinate Judge of *Bhagalpur* (June 30, 1877), which was in favour of the Appellant against the lands in question for the whole amount due on a mortgage bond dated May 12, 1872.

The Appellant sued the Respondent and one *Mungal Das* on the 8th of August, 1876, to recover Rs.18,421 as due on the said bond relating to four parcels of land, and Rs.15,568 as due from that date on current account. The Subordinate Judge decreed against the properties in suit for the whole amount due on the mortgage bond, and for so much of that due on the account stated as had been paid for Government revenue and certain similar burdens, and he also declared *Mungal Das* liable personally for the whole amount due on both accounts.

The Respondent appealed as to three of the parcels in suit, and the High Court reversed the decree and dismissed the suit as against the Respondent with costs. *Mungal Das* did not appeal, and consequently the decree of the Lower Court stood as against him and one of the properties in suit.

The facts are stated in the judgment of their Lordships.

Woodroffe, for the Appellant, contended that the mortgage bond of the 12th of May, 1872, should have been held binding on the Respondent; otherwise that the Respondent was estopped

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

from denying his liability or the validity of the charge created thereby. The Appellant was entitled to treat with *Mungal Das* as trustee and manager of the lands in suit. *Mungal* had been authorized so to treat with him by *Balgovind Das*, whose account in the Appellant's books had been transferred into the name of *Mungal Das*. That authority did not terminate with *Balgovind's* death, otherwise the Respondent was estopped from denying its continuance. Then, with regard to the mortgage of the 2nd of July, 1869, that was held to be binding on the Respondent, and it was contended that it enured to the benefit of the Appellant in respect of the sum paid by him on its transfer. The money paid by *Mungal Das* to the Appellant, without any direction as to its appropriation, ought not to have been treated as applied in payment of the mortgage of July 2, 1869, but in payment of the earlier and unsecured items of the account.

Reference was made to Act IX. of 1872, s. 280; *Hooper* v. *Keay* (1); *Thompson* v. *Hudson* (2); *Moran* v. *Mittu Bibee* (3).

Doyne, for the Respondent, contended that the properties in suit belonged to the Mut of *Jankinuggur*, and that that fact was all along known to the Appellant. *Mungal Das* had no power to mortgage them, except (if at all) as agent of *Balgovind*, and that agency had terminated with his death. He did not purport to mortgage as agent or representative of the Mut, nor did the Appellant accept the mortgage in that light. In truth the properties were held by the mohunt for the time being on trust, and could not be alienated except on proof of sufficient necessity. *Mungul Das* had no authority to state accounts so as to bind the Respondent or the properties in suit.

Woodroffe replied, citing *Maharanee Brojosoondery Debia* v. *Ranee Luchmee Koonwaree* (4); *In re Hallett's Estate* (5); *Madhub Anund Moitro* v. *Gunesh Pershad* (6); *Kishen Chunder Ghose* v. *Baboo Nundkishore Singh* (7).

(1) 1 Q. B. D. 178.
(2) Law Rep. 6 Ch. 320.
(3) Ind. L. R. 2 Calc. 58.
(4) 20 Suth. W. R. 95; 15 Beng. L. R. 176.
(5) 13 Ch. D. 696, 708.
(6) 1 Suth. W. R. 92.
(7) Marsh. 651.

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March 15. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a judgment and decree of the High Court of Judicature at *Fort William*, in *Bengal*, upon appeal in a suit brought by the Appellant against the Respondent and *Mungal Das*, in the Court of the Subordinate Judge of *Bhagulpore*.

In that suit the Appellant sought to recover with interest the sum of Rs.33,989. 12*a*. 6*p*., of which Rs.18,421. 7*a*. 6*p*. were alleged to be due upon a mortgage bond, dated the 12th of May, 1872, and the balance upon a running account from that date to the 13th of August, 1875.

The Plaintiff, Appellant, is a banker, who for many years carried on business at *Bhagulpore*, not personally, but by means of gomashtas. The Respondent, *Bawan Das*, the Defendant No. 1, was the mohunt of the asthul, at *Jankinuggur*, in zillah *Purneah*. He is described in the plaint as *Chela*, or disciple of Mohunt *Gorib Das*, deceased, and heir of Mohunt *Balgovind Das*, deceased.

The Plaintiff claimed to recover the whole amount from the two Defendants, and an order for auction sale of the property mortgaged and hypothecated under the bond for the satisfaction of the bond money. The property hypothecated by the bond consisted of one-third of mouzah *Pourani*, the whole of mouzah *Kankerghat*, the whole of mouzah *Bishenpore Kantahi*, and the whole of mouzah *Ghuneshyampore Pathurgat*, of which the last three mouzahs at the date of the bond were the property of the asthul of *Jankinuggur*, or of the Respondent the mohunt thereof.

The case was tried in the first instance by the Subordinate Judge of *Bhagulpore*, who decreed, amongst other things, in favour of the Plaintiff for the amount sued for, with costs and interest at the rate of 6 per cent. per annum, and further ordered that the amount covered by the bond, as well as that portion of the money included in the running account, amounting to Rs.3166 11*a*. 6*p*., expended in payment of the Government revenue, dak contribution, and road cess be realised from the mortgaged property, and the remaining amount recovered from *Mungal Das*, the Defendant No. 2, alone, who was also declared to be bound to pay the entire amount of the decree.

Mungal Das did not appeal from the decree of the Subordinate Judge, but the Respondent Mohunt *Bawan Das* appealed to the High Court, who reversed the decree, so far as it affected him, and ordered, amongst other things, that the Plaintiff's suit against him be dismissed; and, further, that the three mouzahs, *Kankerghat, Bishenpore Kantahi,* and *Ghuneshyampore Parthurghat* were not liable for any portion of the Plaintiff's claim.

It having been decided by the High Court, and by Her Majesty in Council, in a suit brought by the present Respondent against *Mungal Das,* that mouzah *Pooraini Khalan* was not the property of the Appellant, or of the asthul of *Jankinuggur,* the decree of the High Court was silent as to that mouzah.

The first question in this appeal is, whether the High Court was right in holding, contrary to the opinion of the Subordinate Judge, that the other three mouzahs, in respect of which the decree of the Subordinate Judge was reversed, were not liable to be sold under the mortgage bond of the 12th of May, 1872.

A question was raised before their Lordships whether the property of the asthul was inalienable, except for the benefit of the asthul in cases of necessity; but in the view which their Lordships take of the case it is unnecessary to determine that question. They will therefore do as the High Court did, consider the question, assuming, without deciding, that the three mouzahs were not inalienable. In that view of the case the mortgage bond of the 12th of May, 1872, which was executed by *Mungal Das,* and not by the Respondent, did not bind the property, unless *Mungal Das* had authority, as agent of the Respondent, or of the asthul, to execute the bond, or the Plaintiff was induced by some act or neglect of the Respondent or of the asthul, to believe that *Mungal* had such authority, or that he was the actual owner of the property, and acting under the belief so caused, dealt with *Mungal* as such agent or owner.

As regards the agency, it seems clear from the evidence, and from the findings of both the Lower Courts, that *Mungal Das* acted as and was the duly authorized agent of the asthul, and of the mohunts thereof, and had the management and control of their property from the time of *Jairam* up to the time of mohunt

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Balgovind's death, in or about the month of October or November, 1869.

It was stated correctly by the High Court that an agent's power generally terminates upon the death of his principal, and their Lordships are of opinion that there is nothing to shew that *Gorib Das*, who succeeded *Balgovind*, or the Respondent who succeeded *Gorib*, ever reappointed *Mungal Das* as agent, or led the Defendant to believe that *Mungal's* agency continued.

The Subordinate Judge says, "It appears that, after the death of *Balgovind*, a dispute arose as to who was to be his successor. Both *Mungal Das* and *Gorib Das* were claimants to the succession, but *Mungal* failed to establish his claim, and *Gorib Das* obtained certificate of heirship of *Balgovind*. *Mungal* then declared himself to be absolute owner of the properties."

The finding of the High Court is to the same effect. They say that *Balgovind* died in October, 1869, and that the certificate case was decided in favour of *Gorib Das* on the 26th of November, 1870.

The Subordinate Judge considered that *Gorib Das* was bound to give notice to the Plaintiff that *Mungal's* authority as agent had ceased, but the circumstances are such as to render it incredible that the bank was not fully aware of *Balgovind's* death, and of the termination of *Mungal's* authority. But whether the Plaintiff had or had not notice that the agency had ceased, it is clear that he cannot rely upon such want of notice unless he was thereby induced to deal with *Mungal* as agent. This the Plaintiff did not do, for throughout, after the death of *Balgovind*, he dealt with *Mungal* as the proprietor of the estates and as a principal and not as an agent.

It was held by the Subordinate Judge, and contended at the bar, that the Defendant was estopped from shewing that the property mortgaged to the Plaintiff in 1872 was not then the property of *Mungal*.

It appears that after *Balgovind* became mohunt, a decree for a large amount was passed against him, and there is on the record a registered deed of sale, dated the 15th of August, 1860, purporting to have been executed by *Balgovind*, in favour of *Mungal*

Das, of the three mouzahs which were included in the mortgage bond of 1872, and are the subject of this appeal. As regards two of the mouzahs which were revenue paying estates, the third, *Pathurghat Guneshyampore*, being lakheraj, there was contemporaneously with the deed of sale, a mutation of names, and the name of *Mungal Das* was substituted in the Collector's register for that of the mohunt of *Jankinuggur*. In the Plaintiff's kothi also the accounts, which had been previously kept in the name of *Balgovind*, were, in September, 1861, opened and from that time kept in the name of *Mungal Das*.

The following extract from the judgment of the Subordinate Judge explains the grounds of his decision on this part of the case. He says,

"It is most true, as alleged by the Defendant, that *Mungal Das* was believed by the Plaintiff and his agents to be the absolute owner of the whole properties which belonged to the asthul. But how were they led to believe so, and who made them to believe the same? It was the Defendant's ancestor, *Balgovind Das*, who put *Mungal Das* into the position of being the true owner of the asthul properties, and allowed him to deal with the Plaintiff's firm as such owner. All the properties belonging to the asthul were in his name, he had absolute control over them, and no sort of objection was raised by any member of the asthul to his power; how, then, could an outsider believe him to be otherwise than a true owner of the asthul properties? Under such state of things, I cannot think the Defendant can take any advantage of such belief of the Plaintiff to deprive him of the money lent to *Mungal Das* on security of the asthul properties."

That argument of the Subordinate Judge is, in their Lordships' opinion, completely answered by the High Court. They say,

"Although there is no evidence to shew that the bill of sale of the 15th of August, 1860, was really executed by *Balgovind*, yet from the fact that, shortly after that date, the name of *Balgovind* was removed from the Collector's register, and that of *Mungal Das* placed in its stead, and that the accounts in the Plaintiff's kothi were transferred from one name to the other, it may be reasonably deduced that *Balgovind* was fully cognizant of the contrivance of

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putting the mortgaged property in the benami of *Mungal Das*, to protect it against the claims of a certain decree holder against himself. But the Plaintiff was not misled by this fraudulent device. The witness, *Mohun Misser*, who was the managing gomashta of the Plaintiff's kothi at that time, distinctly admits that the real nature of the transaction was fully disclosed to him by *Balgovind*, when the transfer of names in the accounts was effected at the instance of the latter.

"We are, therefore, of opinion that, so far as the claim relating to the bond is concerned, the grounds upon which the Subordinate Judge thinks that the parcels of mortgaged property in possession of the Appellant are liable are not tenable."

Nor can it be disputed with success, in the face of the evidence of *Baijnath Sahai* and of *Mohur Misser*, both gomashtas of the Plaintiff, that although the dealings in the time of *Balgovind* were with *Mungal Das* as principal and not as agent, they were merely nominally so, and that the credit was in reality given to the asthul in the name of *Mungal Das* as trustee, and furzi for the purpose of concealing the names of the real parties to the transaction.

Mungal was not the real proprietor, and he was not the agent of the Defendant No. 1. These facts must have been known to the Plaintiff or to his agents after the certificate case when *Mungal* repudiated the agency, claimed to be the absolute proprietor, and dealt with the property on his own account.

For the above reasons their Lordships are of opinion that the High Court was right in holding that the bond of the 12th of May, 1872, was not binding upon the asthul or upon the Defendant.

It was further contended on the part of the Plaintiff that, even if the bond of the 12th of May, 1872, was not binding upon the Defendant No. 1, the Plaintiff was entitled to fall back upon the mortgage bond of the 2nd of July, 1869, in favour of *Luchmi Narain*, which was binding upon the asthul and the mohunts thereof, inasmuch as it was executed at the time when *Mungal* was merely the apparent owner for the protection of *Balgovind* from his creditors, and whilst the relationship of principal and agent existed.

This raises the question whether that mortgage was extin-

guished when *Luchmi Narain* was paid, or was intended to be kept alive for the benefit of the Plaintiff. Their Lordships are of opinion that it was extinguished.

It has already been shewn that, at the time of the execution of the mortgage of the 12th of May, 1872, the relationship of principal and agent which had existed between *Mungal* and the asthul in *Balgovind's* time had terminated, and that after *Balgovind's* death *Mungal Das* claimed to be the mohunt of the asthul in his own right, and the proprietor of the estates. In that mortgage he is described as the proprietor of mouzah *Pouraini*, &c., and after a recital, amongst other things, that he has taken a loan from *Mohesh Lall* of Rs.20,000 on interest at 1 per cent. per month, of which the sum of Rs.8266. 8*a.* was for the payment of the balance of the debt due on *Luchmi Narain's* mortgage of 1869, he declares that he will pay in cash, in one lump, the principal with the interest in the month of Jeyt 1280 Fusli, &c., and further, that until the payment of that money he has mortgaged the estates to *Mohesh Lall*, &c.

There is nothing in the bond or in the evidence, or even in the surrounding circumstances, to shew that *Mungal* intended to keep *Luchmi Narain's* mortgage alive, or that he or the Plaintiff intended that the latter should hold that mortgage as an additional security for the loan.

On the 15th of May, 1872, the sum of Rs.8382, the balance due to the estate of *Luchmi Narain* on his mortgage was paid *through* the Plaintiff, and on the deed a receipt for that amount was indorsed in the following words:—"Received in full Rs.8382 up to the 15th of May, 1872, through *Mohur Misser*, gomashta of *Baboo Mohesh Lal Mahajun*, and returned the bond." The bond was then delivered to the gomashta, and was retained by the Plaintiff.

It should be remarked that the mortgage to *Luchmi Narain* carried interest at the rate of Rs.1. 8*a.* per month, whereas the mortgage to the Plaintiff was at the rate of Rs.1 per month. It therefore seems to have been the intention of *Mungal* to borrow money at 1 per cent. per month, partly to pay off and extinguish the mortgage debt at Rs.1. 8*a.* per cent. per month which was a charge upon the estate which he claimed in his own right. There

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was no intermediate mortgage between *Luchmi Narain's* mortgage and the mortgage to the Plaintiff of 1872. *Mungal*, if the proprietor of the estate, as he then claimed, and was stated in the recitals, to be, had no interest in keeping alive *Luchmi Narain's* mortgage; on the contrary, it was his interest, and he must therefore, in the absence of any evidence to the contrary, be presumed to have intended, that the mortgage bearing interest at Rs.1. 8*a.* a month should be paid off and extinguished. Nor upon the hypothesis that *Mungal* was himself the proprietor of the estates had the Plaintiff any interest in keeping *Luchmi Narain's* mortgage alive, inasmuch as under the mortgage of 1872 he had the security of all the estates included in *Luchmi Narain's* mortgage, and it is clear that, even if he had taken an assignment of it, he could not have held it as a security for a higher rate of interest on the new loan than 1 per cent. a month. The only benefit that the Plaintiff could have derived from taking an assignment of *Luchmi Narain's* mortgage of 1869 was that he might have the benefit of that security if it should turn out that *Mungal* was not the proprietor of the estates, as he represented himself to be, and therefore could not legally charge them. But such an event could not have been contemplated by the Plaintiff. It is not probable that *Mungal* would have admitted his inability to bind the property by the deed of 1872, or would have consented to do anything which could raise a doubt as to his power to bind the property as a security for so much of the Rs.20,000 as was in excess of the amount secured by *Luchmi Narain's* mortgage. Even if he would have consented, it is not probable that the Plaintiff would have advanced the full amount of Rs.20,000 upon the security of the estates if he had had any doubt as to *Mungal's* title or right to charge them.

In *Adams* v. *Angell* (1) it was held that the question whether a mortgage paid off was kept alive or extinguished depended upon the intention of the parties. The Master of the Rolls, in delivering his judgment, stated that, "in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his

(1) 5 Ch. D. 634.

intention, it is well established that he retains the benefit of it against the inheritance; for although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can by expressly declaring his intention either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will in the absence of any declaration of intention destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." Applying that rule to the present case, it must be presumed in the absence of any expression of intention to the contrary that *Mungal*, who, when he borrowed the money to pay off *Luchmi Narain's* mortgage, claimed to be the owner of the estate, and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance. Although the money was paid by the Plaintiff's gomashta to *Luchmi Narain's* estate, it was paid with money borrowed from the Plaintiff by *Mungal*, and for which *Mungal* was liable to him. The mortgage was therefore paid off by *Mungal*, and not by the Plaintiff.

It must be presumed that when the Plaintiff lent the money to *Mungal* to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad, as regards a portion of the lands included in it. If an equitable transfer of *Luchmi Narain's* mortgage is held to have been included in the mortgage of 1872, it must be as a security for the whole Rs.20,000, and thus the mortgage at Rs.1. 8*a*. per mensem interest, though intended to be paid off, would be a security for Rs.20,000 at 1 per cent. a month, contrary to the expressed intention of *Mungal* to pay it off.

It was contended on the part of the Plaintiff that it must have been intended to keep alive *Luchmi Narain's* mortgage for the

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benefit of the Plaintiff, because, when he paid the money to *Luchmi Narain's* representative, he took possession of and subsequently kept that mortgage deed. *Luchmi Narain's* representative was paid by the Plaintiff as the banker of *Mungal.* It was paid, not by the Plaintiff as the payer, but through him as the agent of *Mungal* the payer, and with money lent to *Mungal* upon the mortgage of 1872. The receipt was written on the mortgage bond in accordance with the terms of the bond, by which it was stipulated that the mortgagor should cause all payments which should be made within or after the stipulated time to be indorsed on the bond, and that besides the payments so indorsed the mortgagor should not claim the benefit of payments made in any other way. It would not have been in the course of business for the Plaintiff as *Mungal's* banker to pay off the mortgage without taking a receipt for the money, or to take a receipt otherwise than by an indorsement on the bond. Having taken that receipt, it was the ordinary course of business for the Plaintiff to retain it as a voucher for the payment made by him on behalf of his customer. He could not take or keep the receipt without taking and keeping the bond on which it was indorsed, and it was therefore necessary for him to take and keep the bond, independently of the course of business, by which an agent paying off a mortgage on behalf of his principal takes back the mortgage on his behalf, instead of leaving it outstanding in the hands of the mortgagee.

Mr. *Woodroffe*, after the close of his argument, referred to several cases, but none of them shew that a mortgage when paid off and intended by the parties to be extinguished is presumed to have been intended to be kept alive.

Another question is whether the Plaintiff is entitled to recover the Rs.5849 applied out of the moneys raised by *Luchmi Narain's* mortgage in purchasing four small properties, which may be called 8, 9, 10, and 11, and which, by the High Court and by her Majesty in Council, in a suit brought by the present Defendant against *Mungal Das*, were held to be the property of the asthul, because they were purchased with money raised by the mortgage to *Luchmi Narain.* Those four properties were not included in the mortgage of 1872, nor are they included in the suit now

under appeal. It is difficult to conceive how, if *Luchmi Narain's* mortgage was not kept alive and transferred to the Plaintiff as a security for his loan of 1872, the right of *Mungal*, if he had any, against the asthul in consequence of the application of Rs.5849 raised by that mortgage in the purchase of property now held to be that of the asthul, can, in the absence of an express intention to that effect, be presumed to have been included in the mortgage of 1872 as an additional security for the loan of that date. The asthul may be liable to *Mungal*, but that must depend upon the state of accounts between them, as stated by the Judicial Committee, on the 27th June, 1877, in their reasons for the advice given to her Majesty in Council in the appeal of *Mungal Das* and the present Respondent. *Mungal Das* claiming to be the proprietor of the estates included in the mortgage of 1872, retained possession and received the profits of those estates, as well as of the four small properties purchased with the Rs.5849. *Mungal* must render his accounts before he can be held to be entitled to any portion of the Rs.5849. Unless *Mungal's* claim against the asthul was included in the mortgage of 1872, and can be held to have been assigned to the Plaintiff as a security for the loan, there is no privity between the Plaintiff and the Defendant No. 1 in respect of the Rs.5849.

At all events the Plaintiff cannot be entitled to any greater or other rights than those of *Mungal* in respect of the Rs.5849.

It is scarcely necessary to refer to the fact that the plaint does not contain a claim on the part of the Plaintiff to recover on *Luchmi Narain's* mortgage, or to recover the Rs.5849 expended by *Mungal* in the purchase of the lots above referred to as 8, 9, 10, and 11. This is not a mere technical objection, for if the claim had been made, or an issue raised relating to it, the Defendant No. 1, Respondent, might have called witnesses to prove that there was no intention to keep alive *Luchmi Narain's* mortgage, or to include it or *Mungal's* right to the Rs.5849 claimed on account of the purchase of lots 8, 9, 10, and 11, in the security to the Plaintiff for the loan of Rs.20,000.

As to the sum of Rs.3166, 11*a*. 6*p*. awarded by the first Court to be realized from the mortgaged estates on account of money expended on account of the payment of revenue road cesses, &c., on account of the estates, the credit was given to *Mungal* and not

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to the Plaintiff, and there is no privity between the Plaintiff and the Defendant No. 1 in respect of it. *Mungal* may possibly be entitled to it, but that must depend upon the state of accounts between him and the asthul, which cannot be taken in the suit now under appeal.

Their Lordships will humbly advise her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The Appellants must pay the costs of this appeal.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitor for Respondent: *T. L. Wilson.*

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LALLA SHEOPARSHAD . . . . . PLAINTIFF;

AND

JUGGERNATH . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Practice—Onus Probandi—Verbal Admissions by Defendant.

It is a very dangerous thing for a Court to decree in favour of a plaintiff merely upon alleged verbal admissions by the defendant of a sum due, without the most clear and cogent proof of such admissions, especially when the Plaintiff shrinks from bringing his accounts into Court.

APPEAL from a decree of the Judicial Commissioner (March 5, 1880) reversing a decree of the District Judge of *Lucknow* (Jan. 8, 1880), which was in favour of the Appellant.

The facts are stated in the judgment of the Lordships.

Graham, Q.C., and *Woodroffe*, for the Appellant.

Doyne, for the Respondent.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

This is a suit instituted on the 30th of May, 1879, by *Lalla Sheoparshad*, a banker of *Lucknow*, who carries on business through his brother-in-law, *Paras Ram*. The Defendant is one *Juggernath*

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Parshad, described as "the son and representative of the late *Deendial*," also of *Lucknow*. The plaint sets forth that there were commercial transactions between *Deendial* and *Sheoparshad*, and that *Deendial* died on the 23rd of November, 1878. Then it states that on the 22nd or 23rd of December, 1878, the Defendant *Juggernath*, then his father's administrator, called upon the Plaintiff and received a copy of the account contained in the Plaintiff's books, shewing Rs.16,378 to be due to the Plaintiff from the late *Deendial*. The gist of the suit is set forth in paragraph 4 of the plaint, and is as follows:—"That on the 31st of January last"—that is, 1879—"the Defendant, accompanied by *Budree Dass* and *Kulloo Mull*, came to the Plaintiff's house at *Lucknow*, and in the presence of"—a number of persons named—"admitted the said balance of Rs.16,378 to be due from his father, but begged that Plaintiff would forego Rs.1378; and in consideration the Defendant offered to execute a bond for Rs.15,000, charging all his immoveable property with the payment of Rs.15,000, bearing interest at 6 per cent. per annum, payable by annual instalments of Rs.3000; to which proposals the Plaintiff agreed, and the Defendant promised to execute and register the said bond within two days from that date." The breach alleged is that the Defendant has not executed nor delivered the promised bond. The prayer of the plaint is for the sum of Rs.15,000, with interest thereon, at 12 per cent., from the 31st of January, 1878, to date, and future interest to the date of liquidation. Now, that is a plaint in a very peculiar form,—it alleges an agreement and the breach of an agreement; it does not pray specific performance of the agreement; it does not fall back upon the state of things prior to the breach of the agreement, viz., the current account between the Plaintiff and *Deendial* and the debt due from *Deendial* on the footing of that account; but it takes a portion of the alleged agreement, namely, an admission that Rs.15,000 is due, and, alleging that the Defendant has not given the promised security for that Rs.15,000, prays for immediate payment of it, with the usual amount of interest.

On the part of the Defendant there was no written statement, but there was the usual hearing of pleaders before issues were settled, and the pleader of the Defendant puts in this defence:

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First, he says that *Deendial's* books shew that he was the creditor upon the account current in a sum of somewhat upwards of Rs.9000. Then he denies the allegations in paragraph 4 of the plaint, which is the one that has just been read. He says: "No such admission was made by Defendant. Defendant did not go to Plaintiff's house in *Lucknow*. No offer to execute bond for Rs.15,000 was made, nor any compromise. What took place was that on comparing the respective accounts the differences were found to be so great that no settlement was made."

Now there being that positive denial of the agreement or the admission on which the Plaintiff relied, it might have been expected that the Plaintiff would have fallen back, at least as an alternative, upon the foundation of the case, viz., that on the account current between himself and *Deendial*, *Deendial* was indebted to him. But he does not do that. Instead of doing that he adduces evidence to prove the admission of the debt which is set forth in the plaint. The evidence for the Plaintiff consists of his own evidence, that is, the evidence of *Paras Ram*, who throughout acts as the person substantially interested, and of five other persons. No attempt is made throughout the whole of the evidence to prove that any debt was due from *Deendial* to the Plaintiff; the whole gist of the evidence is to shew that there were negotiations between the Plaintiff and the Defendant after *Deendial's* death, and that those negotiations culminated in a meeting of the parties on the 31st of January, 1879, at which the alleged admission and the alleged agreement were made. The principal and most important witness for the Plaintiff is one *Gurdial*, who is a vakil of the Court, and who states that he was called in by a friend or colleague of the Defendant, named *Badridas* to settle the matter; not that he had any authority to settle the matter, but he was asked to attend a meeting, and he did attend the meeting of the 31st of January, at which the alleged things were done. Now to all that there is a positive denial on the part of the Defendant. *Badridas* says that he had nothing whatever to do with the settlement of accounts between the Plaintiff and the Defendant; that he never went with *Gurdial* and others to the meeting, and to the best of his knowledge the Defendant never promised to pay Rs.15,000 to the Plaintiff. Another

witness, *Kullumull*, who is alleged to have been present at the meeting when the agreement was made, states that "no accounts between Plaintiff and Defendant took place before me in Plaintiff's house. On the 31st of January, 1879, *Gurdial* did not bring me and *Badridas* and *Juggernath* there." Then he says, "*Deendial's* accounts were compared by me and *Ganeshi Lal*," who appears to have been some connection of the Defendant's. "Some Rs.25,000 difference were found. I and *Ganeshi Lal* went in December to *Sheoparshad's* house, to *Paras Ram*, during last Christmas holidays. We asked him to compare accounts, and they were compared a little; but even these few items differing, *Paras Ram* got angry, declaring his accounts to be correct, ours wrong. This quarrel about the accounts has never been settled."

Now it was to be expected, there being this difference between the witnesses who gave oral evidence, that something would appear in the books of the Plaintiff to shew what took place. He alleges a formal settlement of accounts, and a formal agreement for discharging the balance. It is almost inconceivable that a banker, or any man of business, should have made no contemporaneous entry of such a very important transaction. But the books of *Paras Ram* are produced, and no entry can be found excepting entries which were made on the 26th of May, 1879, for the purpose of settling the plaint in this suit. When *Paras Ram* is asked for an explanation of that circumstance all he can say is this: "The entry was not till May, although the balance was settled to be due in January, because I was waiting to get the bond to enable me to close the account, namely, in the name of *Ram Ratten Deendial*, and open a new one in that of *Juggernath*. I could have commenced a new account with *Juggernath* on getting the bond, even if I had entered the balance on the 31st of January. I did make a mistake in not getting *Juggernath* to sign an entry made on the 31st of January. I can give no reason for the omission. Have brought *Sheoparshad's* books. There is no entry in the day book of the 31st of January, 1879." Neither in the day book nor in the ledger is there to be found any entry until we come to the 26th of May, 1879. Then in cross-examination he is asked whether it is not the practice to enter the date of the transaction in the day book. He says, "When the entry is

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not made on actual date of the transaction it is the rule to enter that date in the body of the entry." But in the body of the entry made on the 26th of May no date appears.

The only other explanation given is that by *Gurdial*, who says: "It was urged,"—he does not say by whom, but—"it was urged that the balance of Rs.15,000 should be entered in books and signed. I pointed out that, if no instalments were entered by which balance should be defrayed, one anna stamp would suffice; but if instalments were entered, stamp of bond would be necessary. *Kunhi Lal*," who was acting for the Plaintiff, "then said, 'We can enter the balance in our books, and *Juggernath* can give us his bond.' Then *Juggernath* promised his bond in three days. Meeting then broke up."

Now that is the whole explanation why there was no contemporaneous entry made. It is obviously no explanation at all. The plain course of acknowledging in writing the settlement of the account said to be settled could not possibly interfere with the opening of a new account with *Juggernath*, or affect the stamp duty ultimately payable on the bond to be given. The omission to make an entry at the proper time is a circumstance bearing very strongly against the Plaintiff's contention, and leading to the inference that the Defendant's witnesses, who say there was a quarrel over the settlement of the accounts, and that the quarrel still remained open, are much nearer the truth than those witnesses who say that a definite settlement was made at that moment of time.

In that state of the evidence the suit came to a hearing; and the District Judge of *Lucknow*, Mr. *Harington*, feels the difficulty arising from the state of the books. He says: "The Plaintiff's books, kept by one *Paras Ram*, his brother-in-law, are against him, insomuch as they contain no entry of the sum of Rs.15,000 said to have been admitted as due on the 31st of January, 1879, until the 26th of May last, the very date on which the plaint was drawn up. Such carelessness on the part of so well known a firm may appear unaccountable, and the explanation given by *Paras Ram* was an unsatisfactory one." He then weighs the evidence, and comes to the conclusion that, having regard to the position and high character of the witnesses of the Plaintiff, he is bound to believe them. Then comes the question what decree he shall

give to the Plaintiff. He winds up his judgment thus: "Plaintiff falls back on the admission as the basis of his claim for the sum admitted to be due, and for interest. Strictly speaking, he is entitled to this; but looking to the very slipshod nature of the contract, and to the room for reasonable doubts as to the details of what took place on the 31st of January, 1879, I am of opinion that Plaintiff should in his decree be restricted to the conditions of the agreement then made." The Judge therefore seems to have thought that some reasonable doubts were to be entertained as to what actually did take place, and in effect he gives the Plaintiff a decree for specific performance of the agreement made; that is to say, the payment of Rs.15,000 by instalments, the first instalment falling due on the 31st of January, 1880.

Both parties appealed from that decree to the Judicial Commissioner; and the Judicial Commissioner, after laying down the very sound principle that the Plaintiff was bound to prove his case, enters into a careful examination of the evidence, and comes to the conclusion that the Plaintiff has not proved his case.

Their Lordships agree with the view taken by the Judicial Commissioner. They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one. Now in this case, if it be true that *Deendial* was indebted to the Plaintiff in the sum alleged, or in any sum, the Plaintiff's proper course was to bring the accounts into Court and to prove that debt. If the Plaintiff shrinks from doing that, and chooses to rely upon verbal admissions made at a meeting at his house, he should give the most clear and cogent proof of such admissions, and he should bring into Court a case that is not open to reasonable doubt. Their Lordships think that the evidence adduced in this case is very far from that clear and cogent proof which the nature of the case requires.

The result is that in their Lordships' judgment the appeal should be dismissed with costs; and they will humbly advise Her Majesty in accordance with that opinion.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitor for Respondent: *T. L. Wilson.*

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RAJAH NILMONI SINGH DEO BAHADOOR . . . . . } PETITIONER;

AND

UMANATH MOOKERJEE AND OTHERS . DEFENDANTS.

AND

RAJAH NILMONI SINGH DEO BAHADOOR . . . . . } DEFENDANT;

AND

BHOYHARINI DEBIA . . . . . PLAINTIFF.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Probate—Revocation—Locus standi of Creditors of the Testator's Heir.

Held, on the evidence, that the will in this case was duly proved; and, *quære*, whether a creditor of one of the testator's heirs who has attached a portion of the testator's estate in respect of his debtor's right, title, and interest therein can oppose the grant of probate or apply to have it revoked, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors.

APPEALS from a judgment of the High Court (Sept. 10, 1880) and two decrees founded thereon which reversed decrees of the Judge of *Nuddea* (March 24, 1879).

These decrees were made in a suit instituted on the 1st of April, 1876, by the Respondent *Bhoyharini* against the Appellant to obtain a declaration of her right to a four anna share of certain zemindaries under the will of her father-in-law *Bamundas Mookerjee* deceased, who died on the 7th of January, 1875; and in a proceeding instituted by the Appellant on the 22nd of December, 1876, under Acts X. of 1865, and XXI. of 1870, to obtain the revocation of the probate of the said will, which had on the previous day been granted to the Respondents.

Previous to the institution of the suit on the 1st of April,

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

1876, a certificate to collect debts had on the 20th of February, 1875, been granted under Act XXVII. of 1860 to the sons of the testator, except *Taranath* the husband of *Bhoyharini*, who had been disinherited. The Appellant on the 2nd of February, 1875, had attached certain properties as *Taranath's* one-fourth share of his father's estate. The Respondents raised objections under s. 246 of Act VIII. of 1859, which were disallowed on the 11th of February, 1876. *Bhoyharini's* plaint included a prayer that this order might be set aside.

The suit and proceeding were tried together, and on the 3rd of September, 1877, probate was revoked by the Court of the Judge of *Nuddea*. Upon remand by the High Court, the same Court came again to the same conclusion on the 24th of March, 1879. The High Court reversed the decision, and held that the will was duly proved.

The facts are stated in the judgment of their Lordships.

Doyne, for the Appellant, contended that on the evidence the finding of the lower Court was right, and that that of the High Court was wrong.

Leith, Q.C., and *C. W. Arathoon*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in these appeals relates to the execution of the will of *Bamundas Mookerjee*, a large landed proprietor in the district of *Nuddea*, in *Bengal*, who died on the 7th of January, 1875. He had at the time of his death three sons living, *Umanath*, *Taranath*, and *Srinath*, and three grandsons, *Girendronath*, *Horendronath*, and *Norendronath* (the sons of a deceased son named *Arundass*). The Respondent *Bhoyharini* is the wife of *Taranath*. The Appellant, the Rajah, had in the years of 1863 and 1864 obtained decrees against *Taranath* for over Rs.60,000 in the district of *Manbhoom*, which had in 1872 been transferred into the district of *Nuddea* for execution.

Immediately after the death of *Bamundas*, namely, on the 11th

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of January, 1875, *Umanath*, *Srinath*, the three grandsons, and *Bhoyharini* presented a petition to the District Court of *Nuddea*, stating that *Bamundas* had given the whole of his property to them, by a will dated 24th Pous 1281 (7th of January, 1875), and praying for a certificate for collecting the debts due to the deceased under Act XXVII. of 1860. A deposition of *Norendronath*, one of the witnesses to the will, proving its execution, was made on the 5th of February, and on the 20th of February the certificate was granted. On the 2nd of February, the Rajah, the Appellant, applied for the attachment of the right, title, and interest of *Taranath* in certain immoveable property of the deceased *Bamundas*, and the attachment was made a few days after. Thereupon *Umanath*, *Srinath*, the grandsons, and *Bhoyharini* presented a petition to the District Court of *Nuddea*, under sect. 246 of Act VIII. of 1859 (the then Procedure Code) claiming to be in possession under the will. On the 29th of June their claim was disallowed by the officiating Judge, but by an order of the High Court, dated the 7th of September, 1875, the order of disallowance was set aside, and the Court was instructed to take up the claim again, with special reference to the question of possession, the officiating Judge having called upon *Bhoyharini* to prove the execution of the will (which he ought not to have done), and tried the case as if the question was the validity of the will. The result of the hearing on the remand was that, on the 11th of February, 1876, three fourths of *Bamundas'* share and interest in the estates under attachment were released, and the attachment was held good as to the remaining one fourth. The sect. 246 provides that the order passed by the Court under that section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right within one year from the date of the order. Accordingly, on the 1st of April, 1876, *Bhoyharini* filed her plaint in the District Court of *Nuddea* for a declaration of her right under the will to a fourth share of the zemindaries, &c., mentioned in the schedule thereto, left by *Bamundas Mookerjee*, situated within the jurisdiction of the Court. The suit was brought against the Rajah, and against *Taranath* as a *pro formâ* Defendant. The Rajah in his written statement, filed on the 7th

of June, 1876, objected that, as no probate had been taken out under the will, as was required by law, the Plaintiff was not entitled to bring a suit for declaration of her right, and alleged that *Bamundas* did not execute the will, and that it was fabricated after his death by *Taranath* and his co-sharers in order to deprive him of the money due to him.

Before this *Umanath*, *Srinath*, *Bhoyharini*, and the grandsons had, on the 14th of March, 1876, presented a petition to the Judge of *Nuddea*, praying that probate of the will, or, if the Court thought they were not appointed executors under it, letters of administration with the will annexed might be granted to them. The 24th of March was fixed for the hearing, and notice was ordered to be issued. On that date an order was made for granting probate, but before it was given *Bhoyharini* was to put in her husband's consent to her taking probate. It was not until the 21st of December, 1876, that the Judge granted the certificate of probate, and what caused the delay in granting it did not appear. On the next day, the 22nd of December, the Rajah presented a petition to the Judge of *Nuddea*, under sect. 234 of Act X. of 1865, praying for an order setting aside the probate, on the ground that, as by the will the right of his debtor *Taranath* had, in a manner, been destroyed, and the will had been got up with a view to defraud him he ought to have had notice of the application for probate, and he had not had notice. *Bhoyharini*, in her petition in answer said that the will was genuine, and was duly executed by *Bamundas*, and that the Rajah could not become an objector in the probate case, and, consequently, was not entitled to apply to have it set aside.

It may be well to mention here that by Act XXI. of 1870, the *Hindu Wills Act*, certain portions of Act X. of 1865, the *Indian Succession Act*, are made applicable to wills of Hindus in the territories subject to the Lieutenant Governor of *Bengal*, and these portions include the different sections of the Act of 1865, which have been referred to in the course of this litigation.

The petition of the Rajah for revocation of the probate and the suit by *Bhoyharini* were heard together, and issues were framed by the First Court on the 7th of June, 1876.

The principal, and now the only material one, is, Was any will

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executed by *Bamundas* on the 7th of January, 1875? Evidence was given on both sides, and the Officiating Judge of *Nuddea*, on the 3rd of September, 1877, ordered the probate to be revoked and dismissed *Bhoyharini's* suit against the Rajah. *Bhoyharini* appealed to the High Court, which, on the 9th of July, 1878, set aside the order as irregular, on the ground that notice of the application to revoke the probate had not been given to all the members of the family who were interested under the will, the parties being at liberty to take fresh proceedings upon the original petition of the Rajah. The decree in the suit by *Bhoyharini* was also set aside, and the case remanded to the Lower Court to be reheard.

Fresh proceedings were taken and more witnesses were examined, and on the 24th of March, 1879, the Judge of *Nuddea* gave his judgment. He first considered the question whether the Rajah was entitled to be heard against the will, and held that holding a decree against *Taranath*, and having attached *Taranath's* supposed share of the paternal estate immediately after the death of the father, the Rajah did acquire such an interest in it as entitled him to oppose probate of the will, which he contended was not executed by his debtor's father, and which purported to disinherit the debtor. He then held that the will was not genuine, saying he concurred generally in the reasons for the conclusion that the will was not executed by *Bamundas* given by the officiating Judge in the judgment of the 3rd of September, 1877. He said, however, that the propounders of the will had succeeded in shewing, beyond a doubt, that *Bamundas* did certainly contemplate the execution of such a will, and that he caused a draft to be made. The probate granted on the 21st of December, 1866, was ordered to be cancelled, and the suit by *Bhoyharini* was dismissed with costs. The parties appealed to the High Court, which gave judgment on the 10th of September, 1880. The Court held that the Rajah had such an interest in the property of the deceased as entitled him to dispute the genuineness of a will which purported to divert the succession from *Taranath* to another, but that the will was duly executed by *Bamundas*, and made an order in the application for revocation of the probate, and a decree in the suit by *Bhoyharini* accordingly, from

which order and decree the Rajah has appealed to Her Majesty in Council. The following passage from the judgment of Mr. Justice *Morris* states the reasons for the decision upon the former question :—

"The first question that arises is whether *Nilmoni Sing*, as creditor of *Taranath*, has any *locus standi*, whether he has such an interest in the estate of the deceased *Bamundas* as gives him a right to apply for revocation of the probate granted of his will. In support of the proposition that he cannot apply for revocation of probate, several authorities have been cited. In the matter of *Mee Tsee*, petitioner (1), Mr. Justice *Norman*, delivering the judgment of the Court, says: 'We have no doubt of the soundness of the proposition that a person who is not next of kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the will. In *England* it has been held that even a creditor cannot controvert the validity of a will, because it is a matter of indifference whether he should receive his debt from the executor or from an administrator.' Then the case of *Baijnath Sahai and Others* v. *Desputty Sing* (2) is quoted to shew that the learned Judges there considered that, in this country too, creditors of the next of kin to the deceased are not entitled to have citation served upon them under sect. 250, Act X. of 1865, calling upon them 'to come and see the proceedings before the grant of probate or letters of administration.' But this case came subsequently under the consideration of another Bench of this Court, of whom a member of the present Bench was one, in connection with the case of *Komol Lochun Dutt and Others* v. *Nilruttun Mundle* (3), and Mr. Justice *Markby*, in giving the judgment, made the following observations: 'If we thought that the decision in *Baijnath Sahai* v. *Desputty Sing* went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a full Bench, because we should disagree from such a ruling.' We entirely concur in the opinion here expressed, and consider that

(1) 15 Suth. W. R. 351. (2) 25 Suth. W. R. 489.
(3) I. L. R. 4 Calc. Series, 360.

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it is applicable to, and meets the circumstances of the present case. There is no question that *Nilmoni Sing*, immediately after the death of *Bamundas*, and before probate of his alleged will had been taken out, attached the property, which is the subject of the suit of *Bhoyharini*, as the property of his judgment debtor *Taranath*, to which he had succeeded on the death of his father owing to the devolution of the property of *Bamundas* by natural succession to *Taranath*."

The case of *Baijnath Sahai* v. *Desputty Singh* (1) was this: A Hindu testator died, leaving *B.*, alleged to be his adopted son, and *C.*, who would be his heir in default of adoption, and made a will of which *B.* applied for probate, and it was held under the *Succession Act* and *Hindu Wills Act* that creditors of *C.* were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. Their Lordships think this was a right decision.

In *Komollochun Dutt* v. *Nilruttun Mundle* (2) the facts were that *Komollochun* and *Joynarain*, two brothers, originally held possession of certain joint properties in which they had a half share. On the 8th of January, 1872, *Joynarain* died childless, leaving a widow, who would, therefore, under the Hindu law, succeed to his estates. It did not appear that she ever got into possession of her husband's property, and on the 13th of November, 1875, *Komollochun* obtained probate of a will, executed by *Joynarain* shortly before his death. Before the grant of probate, namely, in June, 1875, the widow had sold her interest in her husband's estate to the Plaintiff, *Nilruttun*, who brought a suit to recover her share of the property upon the strength of his purchase, alleging the will to be a forgery. *Komollochun*, who was in possession, defended the suit, upon the ground that the will was genuine, and that by it the property was bequeathed to himself for certain purposes therein specified. The will having been found to be a forgery, the District Judge gave the Plaintiff a decree for the share of the property which had belonged to the deceased. The High Court held that the probate was conclusive, and that an application should have been made to revoke it, and they postponed the

(1) I. L. R. 2 Calc. Series, 208. (2) I. L. R. 4 Calc. Series, 360.

final decision until the Plaintiff had had an opportunity of making one. The whole passage, from which Mr. Justice *Morris* quotes a part, is as follows:—

"If this procedure be followed, we do not see what are the disastrous consequences of holding probate to be conclusive, to which the District Judge alludes. It was said that the Plaintiff in this case would be remediless, because, according to the decision in *Baijnath Sahai* v. *Desputty Singh* (1), he could not apply to revoke the probate. The point is not directly before us, but as at present advised, we think that the Plaintiff could apply to revoke the probate. He is interested by assignment in the estate of the deceased, and if there be no will he has a good title, at any rate, against *Komollochun*, as far as the will is concerned; whether the sale by the widow *Bogolamoye* would be good as against the reversioners does not appear to have been raised and tried, we do not therefore see why he should not apply to revoke the probate. The ground of the decision in *Baijnath Sahai* v. *Desputty Singh* was that the party there, a creditor of one of the next of kin, had no interest in the estate of the deceased. A purchaser from the next of kin is in a very different position from a creditor. If we thought that that decision went as far as to hold that a purchaser, or an attaching creditor, could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a ruling."

The case in which this judgment was given was that of a purchaser from the heir, but no distinction is made between a purchaser and an attaching creditor. Assuming that a purchaser can oppose the grant of a probate, or apply to have it revoked (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. But as, after hearing the Appellant's counsel upon the question of the execution of the will, their Lordships did not consider it necessary to hear the counsel for the Respondents, the question whether the Rajah

(1) I. L. R. 2 Calc. Series, 208.

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could apply for the revocation of the probate has not been argued before them, and therefore they give no final opinion upon it.

They consider that the appeal should be decided in favour of the Respondents, on the ground that the High Court was right in holding that the will was duly executed by the testator. The effect of the will is to give the share of *Taranath* to his wife *Bhoyharini*, and it is expressly stated in it that it is the object of the testator to prevent *Taranath's* share falling into the hands of his creditors. Some time before his death the testator had had a draft will prepared, and sent it to be inspected by two members of his family, and a vakeel named *Parasaram Mustafi*. The latter drew up a revised draft will, and took it to *Bansbaria*, where *Bamundas* then resided. He approved of it, and directed *Chunderkant Surbogya* to take and shew it to his sons at *Birnuggur*, where the family residence was. This he did, and returned with it to *Bansbaria*. On the day of his return, and the next day *Bamundas* was unwell; but on the day after he asked him about the draft, and on *Chunderkant* saying that he had shewn it to his sons and grandsons, who had no objection to offer, he directed him to make a fair copy of it. The fair copy was made, and was read and approved by *Bamundas*, and then entrusted to his grandson *Norendronath* to keep. This was done a fortnight before his death, and the Respondents' case was that, on the evening on which he died he asked for the will and duly executed it. The Rajah's case was that he died without having executed it, being too unwell to do so, and that it was taken to *Birnuggur*, and his signature put to it there on the next day. The will was attested by *Norendronath* and *Chunderkant Mookerjee*, who was the gomashta at *Birnuggur*, and they deposed to its execution as required by the *Hindu Wills Act*. *Dinonath Sen*, the gomashta at *Bansbaria*, did not attest it, but he deposed to having seen it executed. It was argued that his not attesting shewed that the signature of *Bamundas* was forged, and that the signatures of the witnesses were put to the will at *Birnuggur* on the next day, when *Dinonath* was not there. Other circumstances of a similar character were relied upon as suspicious, and a case to prove that *Bamundas* died suddenly under entirely different

circumstances from those described by the witnesses of the Respondents was at first set up by the Rajah, but it broke down, and was not pressed either in the first Court or in the High Court. After a full examination of the evidence and the judgments of the first Court on the original hearing and the remand, the High Court came to the conclusion that there was no sufficient reason for disbelieving the testimony of the attesting witnesses and *Dinonath Sen*, and that it was impossible to discredit the direct and indirect evidence which was presented to prove the genuineness of the will. Their Lordships have come to the same conclusion. Looking at the facts, which are not disputed, it appears to them that, so far from there being ground for disbelieving the witnesses, it is more probable that *Bamundas* carried out his intention to make the will, and did execute it in the manner stated, than that he died so suddenly as to be unable to do so.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal, the costs of which will be paid by the Appellant.

Solicitors for Appellant: *Lambert, Petch, & Shakespear.*
Solicitor for Respondents: *T. L. Wilson.*

J. C.* 1883 Feb. 27.

BALWANT RAO BISHWANT CHANDRA CHOR . . . . . } PLAINTIFF;

AND

PURUN MAL CHAUBE . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Limitation—Act IX. of 1871, *ss.* 10, 118, 123, *and* 145—*Suit to obtain or control the Management of a Religious Endowment.*

Sect. 10 of Act IX. of 1871 applies to cases where the property in suit is being used for some purpose other than that of the trusts to which it is applicable, not to cases where the Defendant admits he is trustee, and the Plaintiff without proving misapplication brings a suit more than twelve years after the cause of action arose, to obtain or control the management. Such a suit if it does not fall within s. 123 or s. 145 of the same Act (by either of which a twelve years' period is provided) is barred in six years under s. 118.

APPEAL from a judgment of the High Court (Feb. 10, 1879), which reversed a judgment of the Subordinate Judge of *Agra* (March 30, 1878).

The Appellant sued to remove the Respondent from the management of the worship and service performed at the temple of *Thakur Ganeshji* and the management of the garden; to remove the power and control of the Respondent from the temple, garden, and mouzah *Mandesi;* and to be declared authorized to appoint a second manager for the purpose of carrying out the objects of the endowment.

The Respondent by his written statement contended that the suit was barred by limitation; that neither the Appellant nor any of his ancestors had had any possession of or concern with the disputed property; that the Respondent and his ancestors had all along been in independent and adverse possession of it; that the disputed property was an endowment appertaining to the temple, and the income had always been spent for the purposes of the temple, and the Respondent's possession had always remained what it then was.

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The facts appear in the judgment of their Lordships.

The Subordinate Judge decided that the Respondent's possession was that of the manager of an endowment, that "consequently his possession could not with reference to its very nature be regarded as adverse," and that the definition given in sect. 10 of Act IX. of 1871 was in all respects applicable to the property in suit, which therefore was not barred by limitation, whether the cause of action accrued beyond or within the last twelve years. He decreed the Appellant's suit with costs.

The judgment of the High Court (*Pearson* and *Spankie*, JJ.), so far as material, was as follows:—

"The primary question is, whether the suit is barred by limitation, or not?

"The Lower Court has erroneously held the provisions of sect. 10, Act IX. of 1871, to remove any bar of limitation. This is not a suit of the nature contemplated by that section.

"Neither of the parties has any personal ownership in the property. In so far as the suit is for a declaration that the Plaintiff is by right of inheritance the chief manager of the temple services and properties, and as such is entitled to dismiss the Defendant and appoint another person as sub-manager, art. 123, and (in so far as it seeks recovery of possession of the temple properties), art. 145, Sched. 2, Act IX. of 1871, appear to be applicable and to bar the suit, inasmuch as it has not been brought within twelve years from the time when the Defendant obtained adverse possession of the office and property.

"The appeal is therefore decreed and the suit dismissed, with costs of both Courts, by reversal of Lower Court's decree."

Cowie, Q.C., and *Raikes*, for the Appellant, contended that a suit to change a trustee was a suit to follow the property within the meaning of sect. 10 of Act IX. of 1871. The Plaintiff in such a suit as this, which is practically for the administration of the trusts of the endowment, follows up the property as heir to the founder, who is in the position of *cestui que trust*, while the manager is trustee: see *Prosunno Moyee Dossee* v. *Koonjo Beharee Chowdhree* (1), *Bhurruck Chunder Sahoo* v. *Golam Shuruff* (2);

(1) Suth. W. R. (1864) p. 157.

(2) 10 Suth. W. R. 458.

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Juggutmoheenee Dossee v. *Sokhamonee Dossee* (1). As to how far private rights and interests are interfered with by the legislation which removes the superintendence of temples from the Government, see Act XX. of 1863, ss. 10, 14: *Jeyangarulavaru* v. *Durma Dorsji* (2); *Agri Sharma Embrandri* v. *Vistnu Embrandri* (3). This is not a suit under that Act so as to require the leave of the Court under sect. 18. That was an enabling Act to give power to sue to those who previously did not possess it—not to restrict the rights of those who did. The Appellant's right of suit is independent of the Act—as heir to the founder. [As to the heir's right to sue before the Act, reference was made by SIR BARNES PEACOCK to two cases decided in 1850 (4).] Limitation does not apply to this case, being one to fix the Defendant with his liabilities as trustee, not to recover possession of property, whether the suit was under the Act or not.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

In this case the Plaintiff, who is also the Appellant, filed his plaint on the 12th September, 1877, and in it he claimed to remove the Defendant, who is the Respondent, from the management of the worship and service performed at the temple of the god *Ganeshji* in *Muttra;* to remove the power and control of the Defendant from the properties belonging to the temple; and to be declared authorized to appoint a second manager for the purpose of carrying out the object of the endowment. The plaint then states shortly the history of the temple; that it was founded by the Plaintiff's ancestor, who dedicated property to it, especially the village or mouzah *Mandesi.* Then it states that "he"—that is, the Plaintiff's ancestor—"entrusted the management of the service and worship to *Mangu Chaube,* the grandfather of the Defendant; and he during his lifetime, and after him his son *Titri Chaube,* have been, according to the intention of the founder of the temple, taking care of it and superintending its affairs. When, in 1865, the Plaintiff came to *Muttra* on pilgrimage, and

(1) 10 Beng. L. R. 33.
(2) 4 Madras H. C. R. p. 2.
(3) 3 Madras H. C. R. 198.
(4) Beng. S. D. A. (1850), pp. 387, 447.

asked the Defendant's mother how the income of the village used to be spent, she refused to render an account of it. The Plaintiff's complaint was rejected by the Collector on the 13th of September, 1865, on the ground of his having no jurisdiction. The Plaintiff then sued in the Settlement Department, but the Defendant himself denied the Plaintiff's right, and therefore he could not obtain redress from that department. The claim for entry of name was disallowed on the 14th of May, 1877, and that is the date of the cause of action."

The precise tenor of the plaint cannot be understood without reference to the dates of the transactions and to some of the documents referred to in it. It appears that the foundation by the Plaintiff's ancestor was prior to the commencement of the present century, so that for eighty years or upwards the management has been in the family of the Defendant. The Appellant became the heir, or one of the heirs, of the founder in the year 1847. The Defendant's title or possession as manager accrued on the death of his father *Titri Chaube* in the year 1863, when the Defendant himself was a child, and under the guardianship of his mother. In the year 1865, the Plaintiff presented the petition referred to in the plaint, which was for the purpose of having the trusts of the endowment carried into effect by the Collector's Court under Regulation XIX. of 1810, which in fact had been repealed some two and a half years previously. But the petition makes a case which, if it were proved, would entitle the Plaintiff to have the proper management provided for by a Court having jurisdiction, for it shews that the funds were applied improperly, and it prays that inquiries may be made from the zemindars and respectable residents of the city of *Muttra*, and that the expenses of the Thakurji may be entrusted to the management of experienced hands and learned divines, as provided by the regulation. The fate of that petition may be divined from the circumstance that the regulation had been repealed. It was dismissed for want of jurisdiction.

The Plaintiff did not then institute any suit in the Civil Court. He took no proceeding until nearly twelve years subsequent to the petition, when he again sought a remedy in the Revenue Department. An order was made by the settlement

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officer on the 14th of May, by which it appears that the Plaintiff applied to expunge the name of the Defendant, who was registered as muafidar of the village *Mandesi*, and for the entry of the Plaintiff's name in lieu of that of the Defendant. It was ordered that the Plaintiff's claim be dismissed.

That dismissal appears to have led to the present plaint, which has been already stated. It appears then that in 1865 the Plaintiff conceived that he had a case of malversation of the property of the endowment against the then manager, who was the Defendant's mother, and that he prayed relief on that ground; that having carried his complaint to the wrong Court, and having failed there, he did not pursue the claim any further, but that nearly twelve years afterwards he simply claimed to be entered himself as muafidar instead of the Defendant; and then he brings the present claim, which is for the purpose of either himself removing or getting the Court to remove the Defendant from his position as manager, and for the Plaintiff to be allowed to appoint another manager.

Now in the defence the Defendant does not dispute but that the property is an endowment appertaining to the god *Ganeshji*. He says that the income of it has all along been spent for the purposes of the temple, and the business of the temple is carried on as before. He then pleads the law of limitation as a bar to the suit. In the Plaintiff's written statement, a sort of replication, he states this: "The Defendant has only since a short time begun to misappropriate the income of the endowed property, contrary to the object of endowment and in contravention of his duty; and he, in the Settlement Department, declared himself, as against the Plaintiff, to be the proprietor and muafidar." That seems to be in answer to the plea of limitation; namely, that it was only a short time ago that the misappropriation had begun.

The Subordinate Judge finds that the Defendant's father in his lifetime repudiated the Plaintiff's right to manage the institution, and that the Defendant has followed his father's conduct. "This," he says, "was done in bad faith, and with the hope of escaping the control of a superior over his proceedings, so that he might independently deal with the endowment. This is

calculated gradually to ruin the property, to divest the donor of his power, and disturb the management proposed by him." On those grounds he holds that the Defendant deserves to be dispossessed.

The Subordinate Judge does not find that there has been any malversation or misappropriation of the property on the part of the Defendant. All that he finds is that he opposes the right of the Plaintiff. He says in the earlier part of his judgment that the plaint specifies the Defendant's misconduct and improper acts on the ground of which he is said to have rendered himself liable to be removed, but on reading the plaint it is clear that the plaint does not specify any misconduct or improper act, unless it be the resistance to the Plaintiff's claim. Neither does the written statement carry the case any further, because, although it uses the expression "misappropriate the income," it does not specify any mode in which the income was misappropriated.

The Subordinate Judge deals with the question of limitation by saying that the Defendant has distinctly admitted that the property is an endowment, and that he holds it as manager of an endowment; consequently, he says, his possession cannot, with reference to its very nature, be regarded as adverse. He thinks, therefore, that if the property is affected by trusts, as both the Plaintiff and Defendant allege, any question is open that may arise between the Plaintiff and the Defendant respecting the right to manage the trusts. The Plaintiff gets his decree upon those grounds, and the Defendant appeals to the High Court. The High Court hold that in so far as the suit is for a declaration that the Plaintiff is, by right of inheritance, chief manager of the temple services and properties, it falls within article 123 of the *Limitation Act*—the Act applicable to this suit in Act IX. of 1871—and, in so far as it seeks recovery of possession of the temple property, it falls within article 145 of the same Act. Therefore they reverse the decree of the Subordinate Judge, and dismiss the suit with costs. The appeal is now presented from that decree, and the question is whether the suit is barred by the *Limitation Act* of 1871.

The reasons now given for avoiding the bar of limitation are, first, that the suit is to be treated as one for the administration

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of the trusts of the endowment, and that it is open to the Court to dismiss the Defendant for misbehaviour in his office, and on this point the Plaintiff seeks to incorporate in the present plaint the allegations in his petition of 1865. What other difficulties there may be in the way of such a suit, such as the omission to get the leave of the Court under Act XX. of 1863, their Lordships desire not to discuss on the present occasion, because there is a complete answer to the Appellant's argument in the fact that no evidence whatever of misbehaviour on the part of the Defendant has been adduced. There is, as has been stated, no direct or sufficient allegation of misconduct in the pleadings. There was no issue framed upon that point, neither has anything been found on that subject by the Subordinate Judge. That ground therefore entirely fails.

The next ground is that the case must be taken as falling within sect. 10 of Act. IX. of 1871, which deals with trust property. That section is as follows:—"No suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives for the purpose of following in his or their hands such property, shall be barred by any length of time." Their Lordships are of opinion that the expression used by the Legislature, "for the purpose of following in his or their hands such property," means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section. But here there is no question of recovering the property for the trusts of the endowment, because the Defendant admits that he is a trustee and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the Plaintiff were to succeed in his suit than it is at this moment. The Plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within sect. 10 of the *Limitation Act*. If it does not, then it

must be within one of the articles of the schedule. Their Lordships do not see any reason to differ from the High Court in thinking that it may fall within article 123 or article 145, but they desire to express no opinion upon that point, and there is some difficulty in ascertaining the exact nature of the suit, owing to the obscurity with which the Plaintiff's title is stated in the plaint. But if it does not fall within either of those sections then the case is caught by the general article 118, which provides for every case that is not previously provided for in the Act. Therefore either the suit is barred in six years or in twelve years—it matters not which, for the cause of action arose at all events before the year 1865.

The consequence is that the appeal must be dismissed; and as the Respondent does not appear, nothing will be said about costs. Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

Solicitors for the Appellant: *Oehme & Summerhays.*

J. C.* 1883 Feb. 21, 22, 23; March 15.

A. B. MILLER, Official Assignee, High Court, Calcutta . . . . . } Plaintiff;

AND

SHEO PERSHAD . . . . . Defendant.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Insolvency—Fraudulent Preference—11 & 12 *Vict. c.* 21, *s.* 24.

Case in which a transfer of a debt due to an insolvent was held to have been made voluntarily within the meaning of the *Insolvent Act*, 11 & 12 Vict. c. 21, s. 24.

Quære, whether the burden of proof is on the transferee to shew that such transfer took place before the insolvency.

Appeal from a decree of the High Court (*Stuart*, C.J., *Pearson*, J., Nov. 17, 1879), reversing a decree of the Subordinate Judge of *Cawnpore* (Sept. 25, 1876), and dismissing the Appellant's suit with costs.

The Appellant, by reason of his official capacity, was appointed assignee of the estate of an insolvent co-partnership, by an order of the High Court of *Calcutta*, on the 22nd of December, 1875, when the members of the co-partnership were adjudged insolvents. The Respondent was a banker at *Cawnpore*, and the Appellant sued to recover from him Rs.9436 and interest, which he asserted had been collusively and fraudulently assigned to him by *Baijnath*, one of the insolvents, and on a date subsequent to the 22nd of December, 1875; or if in fact assigned before that date, that it was assigned "voluntarily" within the meaning of sect. 24 of the *Insolvent Act*, and therefore under sect. 24 fraudulent and void as against him. The Respondent contended that the money was assigned *bonâ fide* previous to the said date, in due course of business and in liquidation of debts previously and at the time due to him by the firm.

The facts are stated in the judgment of their Lordships.

* *Present:*—Lord Blackburn, Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch, and Sir Arthur Hobhouse.

The judgment of the Chief Justice was as follows:—

"The facts material to the question may be stated as follows:—The ruqqa was drawn and transferred to the Defendant on the 20th of December, 1875, and on the 22nd of December, 1875, the parties represented by the Plaintiff were adjudicated insolvents by the *Calcutta* Insolvency Court. By sect. 20 of the *Insolvent Act*, the whole estate of the insolvent, without the necessity of express conveyance or assignment, vests in the assignee in trust for the benefit of the insolvent's creditors. By sect. 21 it is provided that the assignee shall take possession of such estate, and by sect. 26 it is, among other things, enacted that persons holding property of or being indebted to the insolvent shall hold such property for and pay according to such indebtedness to the assignee for the general benefit of the creditors of such insolvent. These sections of the *Insolvent Act* give to the assignee an absolute title to, and complete control over, the entire estate of the insolvent as at the date of the vesting order. But by sect. 24 of the Act it is enacted that 'if any insolvent . . . . shall *voluntarily* convey, assign, transfer, charge, deliver, or make over any estate, real or personal . . . . to any creditor, or to any other person, in trust for, or to or for the use, benefit, or advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances, and *within two months* of the date of the adjudication of insolvency . . . . shall be deemed and is hereby declared to be fraudulent and void as against the assignee of such insolvent.' Relying on this section, the Plaintiff claims the value represented by the ruqqa, on the ground, first, that the 22nd of December, 1875, was not its true date; and, secondly, even if it was, that the ruqqa was given voluntarily and fraudulently, that is, in fraudulent preference of the Defendant. But I can see nothing in the evidence to support such a contention. It is very clear, in the first place, that the 20th of December, 1875, was the true date of the ruqqa; this is the plain inference from all the evidence on the subject. The Plaintiff's recorded statements to the contrary are not distinct and absolute according to certain knowledge on his part, but are rather suggestively asserted, with the view apparently of giving him a *locus standi*

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for contending that the date of the ruqqa was subsequent to the vesting order, and the transaction was voluntary and fraudulent within the meaning of sect. 24 of the *Insolvent Act.* It is also in evidence that the debt represented by the ruqqa was due by *Ram Parshad* to the Defendant, and there was, therefore, good consideration for the transfer to him. There is also evidence to shew that the Defendant, *Sheo Parshad,* by himself, or by *Paras Ram,* his manager, had been pressing for payment of the debt due to the Defendant by *Ram Parshad,* and it is further in evidence that *Ram Parshad* discharged his debt to the Defendant by honestly and in good faith transferring to him the ruqqa, which appears to have been duly cashed by *Kanhae Lall.* Under these circumstances, it is idle to argue that the ruqqa was obtained by the Defendant by any voluntary or fraudulent act on the part of *Ram Parshad.*

"Some English cases were referred to at the hearing on the part of the Defendant, and they appear fully to support his contention. Thus, in *Strachan and Others* v. *Barton* (1), it was laid down that, in order to make a payment to a creditor by a bankrupt a fraudulent preference, the bankrupt must be a volunteer, and not pay in consequence of any request or pressure for payment on the part of the particular creditor. During the argument Chief Baron *Pollock* remarked that the simplest request may be sufficient, if payment was the result of that request. In answer to a suggestion by counsel that there was no request, and that the offer of payment on the part of the bankrupt was voluntary, the Chief Baron observed that it was only voluntary in the sense that the bankrupt offered to satisfy the demand of the creditor, and he gave his judgment in accordance with these views. Baron *Alderson* was of the same opinion. He said: 'The question is, What is the meaning of a voluntary payment? I understand it to be a payment made by the debtor alone'—that is, by the debtor, without pressure or solicitation on the part of his creditor. He goes on to say:—'The test in cases such as the present is, Would the bankrupt have made the payment without the creditor's coming?' In the present case the creditor undoubtedly did come, for it is clear, from the evidence to which I have referred,

(1) 25 L. J. (Ex.) 182.

that *Ram Parshad* was hard pressed for payment by the Defendant and his manager. In the same case, Baron *Martin*, concurring, observed that 'every creditor has a right to go to his debtor and get his debt, if he does so *bonâ fide*.' But in *Mogg* v. *Baker* (1) it was distinctly laid down that a payment is not necessarily voluntary because pressure, in the ordinary sense of the word, has not been used. There the question was whether a possession of goods was voluntary. Under the then *Insolvent Act*, Lord *Abinger*, than whom no man better understood the law on this subject, said that if a demand is made by a creditor *bonâ fide*, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the *Insolvent Act*, and he (Lord *Abinger*) observed that 'the constant practice at Nisi Prius has been that a demand by a creditor is sufficient.'

"Another case referred to at the hearing was that of *Re Cheesebrough, Ex parte Hitchcock* (2), before *Bacon*, Chief Judge in Bankruptcy, where traders in a hopeless state of insolvency, three days before they suspended payment, paid in the ordinary course of business, and without any motive for favouring the payee, a considerable sum to a creditor, who received it *bonâ fide:* the payment was upheld. In giving judgment the Chief Judge, *Bacon*, said:—'The act of the debtor was the only thing that could be inquired into, and if the act done by him could be referred to any other motive than that of giving one creditor preference above another, the payment would not be fraudulent or void.' In the same judgment (3) it was further observed:—'Here was a debt paid to a person entitled to receive it, and received in good faith by the payee. Clearly, it came within the proviso at the end of the section. The statute had put the law upon a plain, reasonable, straightforward footing by having saved the rights of payees acting in good faith. No motive could here be assigned for the bankrupt's preferring this creditor to any other. In order to make out that the payment was fraudulent, it should have been proved that there was such a preference, or some motive for presuming such a preference must be shewn

(1) 4 M. & W. 348.

(2) 40 L. J. (N.S.) (Bank.) 79-82.

(3) Ibid. 82.

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from the other facts proved. Here a fraudulent preference was neither proved, nor could it be justly or reasonably inferred that there was any motive for such preference.'

"Many other authorities might be cited to the same effect, and they all go to shew that, until the bankruptcy or insolvency of a debtor takes legal effect, he does not act voluntarily in the sense of giving a fraudulent preference where he simply pays a debt that is really due at the request, in good faith, of a particular creditor. That such was the state of things in the present case cannot reasonably be doubted. And this view of the facts before us derives considerable force when the present state of the law of debtor and creditor in these provinces is considered. I have already in another case (1) shewn what that law is, and I may be here allowed to repeat what I there laid down. I there said:—'There is no bankruptcy law in these provinces, nor any coercive legal process, which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present Defendant may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any, or even all, of an insolvent's creditors. Doubtless, creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement, of course, that can be given effect to. But, irrespective of such an agreement among a debtor and his creditors, the law—at least, in these provinces—places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided, of course, that he makes those assignments, settlements, or conveyances without fraud—that is, honestly, and in good faith. The fundamental principle that underlies this state of things

(1) Ind. L. R. 2 Allah. Series, 179.

is that so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can, up to the last moment of its possession, deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate or any portion of it to any one or more of his creditors, but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person.' Such undoubtedly is the law binding on this Court, and according to it *Ram Pershad* and the Defendant, acting without any fraudulent intent, but in good faith with respect to a debt honestly due by one to the other, were justified in their dealing, and the Plaintiff cannot interfere between them.

"The Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case. And not apparently knowing the law, he was probably misled by the somewhat confused and evasive contention on the part of the official assignee persistently and elaborately maintained before him.

"Our judgment must therefore be for the Defendant, and the suit must be dismissed with costs in the Court below and in this Court."

Graham, Q.C., and *Woodroffe*, for the Appellant, contended that the Chief Justice was wrong in holding that the only question was whether the rukka was made honestly and for good consideration or voluntarily within sect. 24 of the Act; and that Mr. Justice *Pearson* was also wrong in holding that the only question was whether the same was made before or after the 22nd of December, 1875. On the evidence the Court ought to have held that the alleged transfer was not in fact made until after the vesting order made on that date; that it was not made honestly;

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and if made as alleged by the Respondent on the 20th of December, it was made voluntarily. The Defendant must explain the transaction: *Strachan* v. *Barton* (1); *Mogg* v. *Baker* (2); *Morgan* v. *Brundrett* (3); *Cook* v. *Rogers* (4).

Leith, Q.C., and *Doyne*, for the Respondent, contended that the evidence failed to make out a case of fraud and collusion as alleged; on the contrary the transfer was shewn to be *bonâ fide*, on pressure by the Respondent's agent, in payment of debts justly due, in the course of business as bankers, and before the date of the insolvency.

Counsel for the Appellant were not called on to reply.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal in a suit brought in the Court of the Subordinate Judge of *Cawnpore* by Mr. *A. B. Miller*, the official assignee of the High Court at *Calcutta*, as the assignee of the estate and effects of *Lala Baijnath* deceased, *Bansidhar*, and *Ghasi Ram*, insolvents. *Baijnath* and *Bansidhar* were brothers, and *Ghasi Ram* is the son of a deceased brother, *Sitaram*, and they carried on business in partnership at *Calcutta*, *Lucknow*, and *Cawnpore*, as bankers and piece-goods merchants. The firm at *Calcutta* was *Nanu Mal*, at *Cawnpore*, *Bansidhar*, *Ghasi Ram*, and at *Lucknow* the banking business was carried on under the style of *Choté Lal Sitaram*, and the piece-goods business of *Bansidhar Ghasi Ram*. The business at *Calcutta* was managed by *Bansidhar*, that at *Lucknow* by *Baijnath*, and that at *Cawnpore* by one *Sheo Dial* as munib (agent). The *Calcutta* firm stopped payment at midnight on the 20th of December, 1875, and were adjudicated insolvents on the petition of two of their *Calcutta* creditors, on the 22nd of December. The Defendant carried on business at *Lucknow* under the style of *Sheo Parshad Khazanchi*. His business was managed by his brother-in-law, *Paras Ram*, who was himself a partner in a firm at *Cawnpore* styled *Paras Ram-Beni Madho*.

(1) 25 L. J. (N.S.) Ex. 182.
(2) 4 M. & W. 348.
(3) 5 B. & Ad. 289.
(4) 7 Bing. 438.

The official assignee in his suit alleged that one *Munshi Ram Parshad*, a resident of *Lucknow*, owed Rs.9436 to the banking firm of *Choté Lal Sitaram* at *Lucknow*, and that *Baijnath*, who died in 1876, colluded with the Defendant *Sheo Parshad*, and fraudulently transferred this debt to him, and in the account book wrongly entered the date the 21st of December, 1875, and that the Defendant had recovered the debt from *Ram Parshad*, and the official assignee demanded the amount of it, with interest.

The Defendant in his written statement said that there were dealings between his firm and the firm of *Choté Lal Sitaram* at *Lucknow;* and with reference to the money dealings from the 13th of July to the 14th of December, 1875, Rs.9452 were found due by *Baijnath*, and on the 20th of December, 1875, *Ram Parshad* drew, under the assignment of *Baijnath*, a rukka for Rs.9452 through *Paras Ram*, on account of the money due to the Defendant upon one *Kanhaia Lal*, deceased, a banker resident at *Lucknow;* that *Kanhaia Lal*, according to the rukka, dated the 20th of December, 1875, made entries in his own firm, according to banking usage, against the Defendant's name, in respect of the item of Rs.9452, and the said item is shewn in *Kanhaia Lal's* account books to the Defendant's credit.

On the 16th of April, 1878, the Subordinate Judge recorded as the issues in the case:—

1. When did the transfer of the principal sum in suit take place? Is the transfer unlawful, and was it fraudulently made or not?
2. Is the Plaintiff entitled to interest?

On the 11th of September, 1878, before he proceeded to take evidence, he questioned the pleaders of both parties, and recorded that the Plaintiff's pleader stated that the Plaintiff claimed to have the transfer declared invalid, on the grounds,—

1. That it was really made after the 22nd of December, 1875, and was made fraudulently.
2. Even granting that the transfer took place before the 22nd of December, it was voluntarily made, and was invalid under sect. 24 of the *Indian Insolvency Act.*

The Subordinate Judge does not appear to have made any

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alteration in the issues which he had recorded, but their Lordships think this was not necessary, and that the question whether the transfer was voluntary and fraudulent and void as against the assignee was sufficiently raised.

The Subordinate Judge made a decree for the Plaintiff for Rs.9436. 12*a.* and Rs.2264. 13*a.*, interest thereon, for reasons which will be afterwards mentioned, and this was reversed by the High Court, which dismissed the suit, with costs.

Their Lordships have come to the conclusion that the transfer was voluntary, within the meaning of sect. 24 of the *Indian Insolvency Act*, 11 & 12 Vict. c. 21. That section is:—

"And be it enacted that if any insolvent who shall file his petition for his discharge under this Act, or who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over, any estate real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor, or to any other person in trust for or to, or for the use, benefit, and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be, or if made with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed and is hereby declared to be fraudulent and void as against the assignees of such insolvent."

The Plaintiff having proved, by a deposition taken at *Calcutta*, that the order of adjudication was made on the 22nd of December, examined as a witness *Sheo Dial*, who was the agent of the insolvent firm at *Cawnpore*, and became the servant of the official assignee. He said the account books of the firm of *Choté Lal Sitaram* at *Lucknow* were stolen on the 11th of March, 1878, and in December, 1877, he examined the account of the Defendant in those books. He produced a memorandum, from which he stated

that on the 21st of December, 1875, Rs.9636. 12*a.*, were entered on the credit side, and Rs.9436. 12*a.* on the debit side, in the cash book of *Choté Lal Sitaram*, after adjustment, and by both these items the account of *Sheo Parshad* was closed in this way, that there was a balance of Rs.200 due by *Sheo Parshad*,—that the firm at *Cawnpore* was under his management, and at 4 A.M. on the 21st of December he learnt from *Bani Madho* (not the brother of *Paras Ram*) that the firm of *Baijnath* had failed. The items entered in the account books were in *Baijnath's* handwriting.

The principal witness for the Defendant was *Paras Ram*, who said:—

"I was manager (muhtamin) of the firm of *Lala Sheo Parshad*, situate at *Lucknow*, and used to do all the work of the firm of *Lala Sheo Parshad*. Rs.8500 were due by the firm of *Baijnath*, styled the firm of *Chotey Lal* and *Sita Ram*, up to the 20th of December, 1875, in this way, that there were three hundis drawn by *Baijnath*, aggregating to Rs.7500, and a currency note for Rs.1000 was lent to *Baijnath*—that up to the 20th of December, 1875, the term of none of the three hundis had expired. Before the 20th of December, 1875, I had pressed the demand for Rs.8500 on *Baijnath*, and the reason for my making the demand before the expiry of the term of the hundis was that *Baijnath* having drawn a hundi for Rs.5000, had gone to the *Bank of Bengal* for borrowing money, and the agent to the *Bank of Bengal* at *Lucknow* refused to give money, saying that he had been prohibited to receive his (*Baijnath's*) hundis by the *Calcutta* (bank), and consequently he would not take his hundi. This happened two or three days previous to the 20th of December, 1875, consequently I made the demand on *Baijnath* on the 20th of December, 1875, and he then caused Rs.8500 to be paid by *Munshi Ram Parshad*. I had told *Baijnath* to give me Rs.8500 in cash. *Baijnath* then said, 'I have no money in cash; money is due to me from *Munshi Ram Parshad*. Accompany me, and I will make him pay money to you.' I immediately proceeded with *Baijnath* to *Munshi Ram Parshad's* house, and *Baijnath* said to *Munshi Ram Parshad*, '*Lala Sheo Parshad* is pressing his demand hard on me; give whatever money is due to me by you.' *Munshi Ram Parshad* then, having adjusted the account, struck a balance

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of Rs.9452 against himself, and he drew a ruqqa on *Kanhaia Lal*, banker, resident of *Lucknow*, to the effect, 'Pay Rs.9452 to *Lala Paras Ram*,' and *Kanhaia Lal*, on seeing the ruqqa, debited Rs.9452 to *Munshi Ram Parshad* in his account books, and credited the same to my account. Some of those persons who have monetary dealings with the firm of *Lala Sheo Parshad* at *Lucknow* sometimes make debit and credit entries in my name in their account books, but the monetary dealings are carried on for the firm of *Lala Sheo Parshad*. *Baijnath* caused Rs.9452 to be paid to me by *Munshi Ram Parshad*, for this reason, that Rs.8500 were paid in the account of *Lala Sheo Parshad*, and Rs.525 were given, it being due to *Kanhaia Lal*, on whom the ruqqa was drawn, and Rs.427, due to the firm of *Paras Ram* and *Beni Madho* in *Cawnpore*, was caused to be paid. At the time when *Munshi Ram Parshad* wrote the ruqqa on *Kanhaia Lal* for Rs.9452, *Lachman Parshad Daroga*, *Maulvi Faqir-ul-ah*, *Lala Baijnath*, and I were present, and *Munshi Ram Parshad*, having written the ruqqa, had given it to me before *Baijnath*, and took back a ruqqa of his from *Baijnath*. I sent for ruqqa written by *Munshi Ram Parshad* to *Kanhaia Lal* through *Becha*, peon employed in the bank, and *Kanhaia Lal*, on seeing the same, accepted it. At the time when the sum of Rs.427 was caused by *Baijnath* to be paid to the firm of *Paras Ram—Bani Madho*, the whole amount due to *Paras Ram—Bani Madho* had not been paid in full. The debit and credit entries in the books of the firm of *Lala Sheo Parshad* were made on the 31st of March, 1876, in respect of Rs.9452. The debit and credit entries, regarding the ruqqa of the 20th of December, 1875, were delayed and made on the 31st of March, 1876, because when the accounts of *Kanhaia Lal* were compared then this item was debited and credited; this item was not an item of cash, and consequently it was not debited and credited immediately."

The Judge, on the 26th of August, 1878, ordered a commission to be issued to three experts to examine the Defendant's account books, and on the 11th of September, 1878, they reported as follows:—

"The item of Rs.9,452, entered in rokar-bahi (cash-book),

page 218, as credited to *Chotey Lal Sitaram*, on account of assignment made against *Munshi Ram Parshad*, has been credited on 6th Sudi Chait, Sambat 1933, corresponding to the 31st of March, 1876, and in its detail the following words are written, '8th Badi Pus, debited to *Kanhaia Lal*, caused to be paid by *Munshi Ram Parshad*.' The items comprising this item appear to be entered on the debit side as follows:—

	R.	A.	P.
"Page 181. 3rd Badi Pus, Sambat 1932, corresponding to the 15th of December, 1875, one note, No. 88,969 L-53, through *Umrao Ali*	1,000	0	0
"Page 26 of the naql (bahi). 2nd Badi Pus, Sambat 1932, one hundi, drawn by *Chotey Lal Sitaram* at *Cawnpore*, upon *Bansidhar Ghasi Ram*, payable sixty-one days after 2nd Badi Mangsar, credited to *Surat Changa Mal*, and money paid on 13th Badi Pus	2,500	0	0
"Page 218 of rokar-bahi. 6th Sudi Chait, Sambat 1933, corresponding to the 31st of March, 1876,—			
"One hundi drawn on *Calcutta* by *Chotey Lal Sitaram*, upon *Nannhu Mal*, in my (*i.e.*, *Sheo Parshad's*) favour, payable fifty-one days after 5th Sudi Mangsar, credited to *Ajudhia Parshad*	2,500	0	0
"One hundi drawn at *Cawnpore* by *Chotey Lal Sitaram*, upon *Bansidhar Ghasi Ram*, in favour of *Paras Ram*, payable sixty-one days after 5th Badi Bangsar, credited to *Gur Parshad Shukal*	2,500	0	0
"On Pus Badi 8th, Sambat 1932, credited to *Kanhaia Lal*	525	0	0
	5,525	0	0
"Page 264 of rokar-bahi. 6th Sudi Bhadon, Sambat 1933, corresponding to the 25th of August, 1876, credited to *Lala Paras Ram*, and debited to *Chotey Lal Sitaram* ..	427	0	0

"All these items amount to Rs.9,452, mentioned above."

Except the entry in the cash book, the only evidence of the loan of Rs.1,000 is the vague statement of *Paras Ram* that a currency note for Rs.1,000 was lent to *Baijnath*, but their Lordships will take it as a fact that this sum was lent on the 15th of December. The next three sums of Rs.2,500 each are the amounts of three hundis drawn by one of the insolvents' firms upon another of them. These hundis were drawn in favour of *Paras Ram*, as the Defendant's agent, and had been discounted by him, and were on the 20th of December in the hands of third persons. They were subsequently taken up by the Defendant, or

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debited to him by the holders. There was thus a contingent liability on the part of the Defendant on these hundis, and on the 21st of December the parties must have had full knowledge that they would be dishonoured. Their Lordships are not prepared to say that the transfer, so far as it provided the Defendant with funds to meet the hundis, would, as a matter of law, be voluntary within the meaning of the *Insolvent Act*, but the transaction was out of the ordinary course of business, and there was no satisfactory explanation of the delay in making the entry of it in the Defendant's books.

Looking at this part of the transaction alone, there is strong *primâ facie* ground for thinking that it was done with the view of preferring the Defendant. But the hundis are mixed up with the other items, and the whole formed one transaction. The next item is the Rs.525 said to be credited to *Kanhaia Lal* on the Hindu date corresponding to the 20th of December. But it is taken from page 218 of the cash book, and was not entered in it till the 31st of March, 1876. As to this sum there is only *Paras Ram's* statement that it was due, and the evidence of *Bhondu Mal*, who said, "*Baijnath Lal* had given permission to *Kanhaia Lal* to make a deduction of Rs.525 from the amount of the ruqqa. This permission was received two days before the execution of the ruqqa, and for two days I had been demanding money from *Baijnath*." The remaining item of Rs.427 was not credited to *Paras Ram* and debited to the insolvents' firm until the 25th of August, 1876, and is clearly a voluntary payment.

Turning now to the books of *Kanhaia Lal*, their Lordships find fresh cause for suspicion. They were produced by *Bhondu Mal*, his grandson, he having died on the 30th of November, 1876. As to these books, the report of the experts, to whom they were referred for examination, is as follows:—

"In obedience to your order, we have inspected and examined the said account books, and it appeared to us that the accounts of *Paras Ram* are entered at leaf fifty-six of these account books. In it, on the credit side, an item of Rs.9452 is entered, with reference to the day-book, leaf 127, in this way—'Credited to *Paras Ram* on Pus Badi 8th, Sambat 1932, Anglice 20th of December, 1875, (and) debited to *Munshi Ram Parshad*.' In the same day-

book, at leaf 127, Rs.9452 are debited to *Munshi Ram Parshad*, and in its detail the following words occur:—'Pus Badi 8th, Sambat 1932, Anglice 20th of December, 1875, credited to *Paras Ram* the amount of a ruqqa.' In this day-book the first three leaves have not been paged, and then the fourth leaf has been paged, and the account commences to be written on the back of the leaf marked four, and the pages have been regularly numbered up to leaf 116. The next leaf should have been numbered 117, but in this day-book leaf 127 is in place of 117; from leaf 117 up to 126, ten leaves are wanting in the account book. In this day-book, at leaf 127, an item of Rs.13. 2*a*. 3*p*. is debited to *Kanhaia Lal*, and in the account of *Kanhaia Lal* the said item of Rs.13. 2*a*. 3*p*., which is entered on the debit side, has been posted from the day-book, and leaf 117 is mentioned. The cash balance, which has been struck in the day-book, is in regular order."

This view was adopted by the Subordinate Judge, and it is unnecessary to state what he said.

Another suspicious fact is, that the ruqqa, which was drawn by *Ram Parshad*, says, "Rs.10,352 were due to *Lala Baijnath Khazanchi* by me under a ruqqa, dated the 17th of May, 1875, bearing my signature. Now I draw this ruqqa in your favour, to the effect that, under his assignment, I am causing Rs.9452 to be paid to *Lala Paras Ram*, on account of his debt," and there is no evidence that any part of the Rs.10,352 had been paid by *Ram Parshad*. For aught that appears, the balance of Rs.900 may have been given up to *Ram Parshad*.

These are the material facts in the case, and upon consideration of all the circumstances, their Lordships have come to the conclusion that the transfer was voluntary within the meaning of the *Insolvent Act*, and fraudulent and void as against the assignee.

It is therefore necessary to decide whether the transfer was made on the 20th of December. The Subordinate Judge put the burden of proof of this upon the Defendant, and found that it was not; and inferring from this and the entries in the Defendant's books, and the abstraction of the leaves from *Kanhaia Lal's* books, that it was made after the 22nd of December, he made a

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decree for the Plaintiff. Their Lordships are not prepared to say that he was right as to the burden of proof, or whether his conclusion as to the time of the transfer was a right or a wrong one; but they consider that justice to him requires them to say that, so far from thinking, as the Chief Justice in his judgment on the appeal says, that "the Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case," they are of opinion that he had before him a case upon which he might come to the conclusion to which he came. Their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the Subordinate Judge, with costs. The Respondents will pay the costs of this appeal.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondent: *W. & A. Ranken Ford.*

RADHA PERSHAD SINGH . . . . . PLAINTIFF;

AND

RAM PURMESWAR SINGH AND OTHERS . DEFENDANTS.

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Dec. 1.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Interlocutory Costs—Order as to Costs of Suit generally does not override Interlocutory Order.

It is not the practice when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs.

Where by an order of remand by the High Court in 1869 the Respondents had been ordered to pay costs in both Courts to the Appellant, and subsequently the Appellant's suit was dismissed by the High Court in 1874 and the Appellant ordered to pay the costs of the suit generally, the order of 1869 not being under review or rehearing or brought to the notice of the Court:—

Held, that it was neither the intention nor the effect of the order of 1874 to override that of 1869, and that the Appellant was entitled to set off the costs properly recoverable by him under the earlier order against those due by him under the later one.

APPEAL from an order of the High Court (Feb. 24, 1879), reversing an order of the District Judge of *Shahabad* (August 3, 1878).

The question decided in this appeal arose upon an application by the Respondents for the execution of an order of the High Court dated the 10th of June, 1874, in their favour as to certain costs, upon which the Appellant claimed to set off certain other costs to which he had been declared entitled by an earlier order of the High Court made in the same suit and dated the 26th of April, 1869. The circumstances under which the question arose sufficiently appear in their Lordships' judgment.

The terms of the order of the 10th of June, 1874, were as follows:—"It is ordered and decreed that the decree of the Lower Court be reversed; and that the suit of the Plaintiff be dis-

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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missed; and it is further ordered and decreed that the Plaintiff *Radha Persad Sing* do pay to the heirs of Defendant No. 1 and Defendant No. 2, the sum of Rs.5678, as per details at foot, being the amount of costs incurred by them in this Court, with interest thereon at the rate of six per cent. per annum from this date to the date of realization; and it is further ordered and decreed that the said *Radha Persad Sing* do pay to the said Defendant No. 2, and the heirs of the late Defendant No. 1, the costs incurred by them in the Lower Court, with interest thereon at the rate aforesaid from the date of the decree of the said Lower Court to the date of realization."

Leith, Q.C., and *Doyne*, for the Appellant, contended that it was evident from the terms of the order of 1874 that the High Court did not intend to deal, and did not deal, with any costs incurred in the Lower Court, except those incurred during the trial before the Judge from whose decision the appeal had then been preferred. Nor did it deal with any costs at any time incurred in the High Court except those which were detailed. It cannot be construed as dealing with a previous order of a co-ordinate Court as to the costs of an issue not before the High Court on the second occasion. If so construed the judgment would be *ultrà vires*. The Divisional Court would have had no jurisdiction so to interfere with an order of another Divisional Bench.

C. W. Arathoon, for the Respondents, contended that the order of 1869 had been treated throughout the litigation as not absolute in its terms, but as leaving the costs mentioned therein as an open question to be dealt with in the cause. It was competent for the High Court by its order of the 10th of June, 1874, to deal with the entire costs of the suit. The order purported so to do, and its effect, especially after the confirmation thereof by the Judicial Committee, was to give those costs in their entirety to the Respondents.

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

In this case there have been changes of parties, as frequently happens when a litigation extends over many years; but they have made no difference to the present question, and it will be convenient to speak of the Appellant and Respondents as if there was no change. So speaking of them, the Appellant has been ordered to pay to the Respondents the costs of a litigation with them. He now seeks to set off against those costs the costs of a prior part of the same litigation which were awarded to him; and the question is whether his right to those prior costs has been displaced by a subsequent decree in the later part of the litigation. In the Court below the Appellant was the Plaintiff, and the Respondents were the Defendants. The suit was for the recovery of certain lands; and the Respondents set up a defence of the law of limitation. That issue was decided in their favour by the Subordinate Judge on the 31st of July, 1868, and in consequence the Appellant's suit was dismissed. An appeal was presented to the High Court, who delivered judgment thereon on the 26th of April, 1869. By their decree they reversed the decree of the Subordinate Judge, disallowed the defence of limitation, and ordered that the Respondents should pay to the Appellant the sum of Rs.2499 13*a.* 5*p.*, being the amount of costs incurred by him in the High Court with interest; and further ordered that the Respondents should pay to the Appellant the costs incurred by him in the Lower Court with interest. With that order the suit was remanded. The litigation was then fought with various fortune, and came up twice to the High Court. On the second occasion the High Court gave a final decree in favour of the Respondents. That decree was pronounced upon the 10th of June, 1874, when the Appellant's suit was dismissed, and he was ordered to pay the costs of the suit generally. The decree has been, so far as regards costs, affirmed by Her Majesty in Council; but the construction and effect of it are not in any way altered by that affirmation.

The Respondents applied to the Subordinate Court for execution for their costs, and the Appellant then claimed to set off

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against the costs claimed by the Respondents the costs which were due under the decree of the 26th of April, 1869. It may be well to mention that an application had been made by the Appellant for payment of those costs soon after they were awarded to him, but it appears to have been thought proper that the question should stand over until the final determination of the suit. The amounts claimed for costs by the Appellant were, first, the sum found by the High Court itself on the 26th of April, 1869, to be due for expenses in that Court; and secondly, an amount of Rs.5806 odd, which were found by the Subordinate Court on a previous occasion to be due in respect of the regular suit, as it is called, disposed of by the Court of the Subordinate Judge on the 31st of July, 1868. Mr. *Brett*, the Judge of *Shahabad*, allowed those amounts to be set off by the Appellant against the claim of the Respondents, and he made an order to that effect on the 3rd of August, 1878. The Respondents presented an appeal to the High Court, and on the 24th of February, 1879, the High Court reversed the order of the Subordinate Judge and disallowed the claim of the Appellant to set off the costs awarded to him in the decree of the 26th of April, 1869; and they gave to the Respondents the costs of that appeal.

The ground taken by the High Court seems to be that the decree made on the 10th of June, 1874, giving the whole costs of the suit, overrode the decree of the 26th of April, 1869, which gives the costs of a portion of the suit in which the Respondents had failed. Their Lordships think that there is no ground for so construing the decree of 1874. The question of costs awarded by the decree of April, 1869, was not before the Court in 1874; nor is it the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs. If there were any mistake in the prior order it ought to have been the subject of some review or rehearing, in which the Court should have had the subject brought to its mind. That was not the case, and their Lordships consider that it is neither the intention nor the effect of the decree of the 10th of June, 1874, to interfere with the costs awarded by the order of the 26th of April, 1869.

It has been mentioned that there were two amounts claimed by the Appellant under the decree of 1869. With regard to the first, the costs incurred in the High Court on the appeal decided in 1869, their Lordships consider that the Appellant is entitled to set those off against costs now claimable by the Respondents.

With regard to the second amount, questions arise as to the items composing it. The first of those items, and the most considerable of them, is a sum of Rs.3245, which is the Court fee. The Court fee applies not only to the hearing in 1869, but to the whole of the litigation; and inasmuch as the general costs of the suit are awarded to the Respondents, it would be improper that they should have to pay the Court fee on account of their failure in the first stage of the suit.

The next item is a sum of Rs.2490 for pleader's fee; and it may be that a portion of that should be referred to the general costs of the suit, and not to the costs of the hearing of 1869. Their Lordships are not in a position to say how that matter is.

Under those circumstances their Lordships conceive that the proper order to be made will be: To discharge the order of the 24th of February, 1879; to declare that the Appellant is entitled to the costs properly recoverable under the decree of April, 1869; to declare that those costs consist of the sum of Rs.2499. 13*a*. 5*p*. mentioned in the decree of April, 1869, and also such costs in the Court below as were occasioned by the defence of the law of limitation, and the costs of the trial and hearing thereon, and of the decree of the 31st of July, 1868; that it be referred to the Court of the Subordinate Judge of *Shahabad* to assess the last-mentioned costs upon that footing; and that the cause be remitted with a declaration that the costs when so assessed, together with the said sum of Rs.2499 13*a*. 5*p*., are to be set off against the costs found due to the Respondents. Interest should be charged as ordered by the decree of the 26th of April, 1869.

Their Lordships will make an humble recommendation to Her Majesty to that effect.

With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the Appellant does not wholly succeed; but having regard to the fact that the whole of the Appellant's claim was opposed in the Court below

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upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs.

They therefore think it right that the Appellant should have the costs of this appeal, and also the costs in the High Court.

Solicitors for Appellant: *Burton, Yeates, Hart, & Burton.*
Solicitors for Respondents: *Henderson & Co.*

MINA KONWARI . . . . . PLAINTIFF; J C.*
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JUGGUT SETANI . . . . . DEFENDANT. June 7, 8, 30.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Registration—Summary Decision—Execution—Limitation—Act XX. of 1866, *sect.* 52—*Act XIV. of* 1859, *sect.* 22—*Estoppel.*

A decree obtained under Act XX. of 1866 on a specially registered bond is (see sect. 52) a summary decision.

Held, that such a decree obtained on the 9th of July, 1867, was governed as regards limitation by Act XIV. of 1859, sect. 22, which provides a a period of one year, and therefore that a first application for execution in May, 1870, was barred.

Petitions by a judgment debtor to postpone a sale in execution, which contain no admission that the decree can be legally executed, are not within the description of an estoppel given in the *Indian Evidence Act*, 1872, sect. 115 *et seq.*, and such petitioner is not estopped from insisting that execution is barred.

APPEAL from a decree of the High Court (Nov. 29, 1880), whereby an order of the Subordinate Judge of *Moorshedabad* (July 15, 1880) was set aside, and the Appellant's application for execution of decree was dismissed with costs.

The question upon which the Courts differed was as to whether the right to execute the decree in question, dated July 9, 1867, was under the circumstances stated in the judgment of their Lordships barred by limitation.

The judgment of the High Court (*M'Donnell* and *Broughton*, JJ.) was as follows:—

"The question in this case is, whether the application for execution of decree, made on the 23rd of July, 1873, is barred by limitation. The *Limitation Act* IX. of 1871, came into force on the 1st day of July, 1871. It says that, "nothing contained in sects. 2 or 3 or in Parts II. and III. applies—(*a*) to suits instituted before the 1st day of April, 1873, (*b*) to suits under the *Indian*

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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Divorce Act, and (*c*) to suits under *Madras* Regulation VI. of 1831." There was nothing in the Act to exempt applications for execution from its operation; and it has been held in this Court, as well as in the Court of *Bombay*, that the Act did come into operation in the case of these applications on the 1st day of July, 1871. That being the case, the question is, whether within three years before the 23rd of July, 1873, anything has been done to enforce or keep in force the decree. Now the last application that was made by the judgment creditor was the application of the 20th of July, 1870, and that, of course, is beyond the three years. But then it is said, that there was an order made on that application on the 3rd of August, 1870, which is to be construed as an application to enforce or keep in force the decree; but that was an order of the Court itself. It was not an application at all, and on the 29th of August there was another order striking off the case. Neither of these orders can be considered as applications or acts of the judgment creditor. They are simply acts of the Court, and not steps taken by the judgment creditor in any sense. As we consider, therefore, that the Act of 1871 was in force, and not the Act of 1859, it is unnecessary to consider whether the order of the 3rd August, 1870, would be a proceeding to keep alive the decree in the terms of Act XIV. of 1859, sect. 20, as construed by the Privy Council in the case of the Maharajah of *Burdwan* v. *Bulram Singh* (1). We consider, therefore, that this application for execution is out of time, and therefore the Appellant in this case must succeed. The appeal is decreed with costs."

Cowie, Q.C., and *Doyne*, for the Appellant, contended that this judgment was wrong, and that the Appellant was entitled to execute his decree. The decree was obtained on a bond specially registered under Act XX. of 1866—for the effect of special registration see sects. 52 and 53. A decree was made, and no application to set it aside was made under sect. 55. It was made on the 9th of July, 1867. The first application to execute it was made on the 10th of May, 1870, another was made on the 20th of July, 1870, for execution in a different district. An order

(1) 5 Beng. L. R. 611.

was made thereon on the 3rd of August, the case was struck off on the 29th of August, 1870. Then came a further application to execute on the 23rd of July, 1873, which was more than three years after the application made on the 20th of July, 1870. It was contended that there was a pending proceeding up to the 29th of August, 1870, or in any case up to the 3rd of August; and that Act IX. of 1871 was not applicable. See *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdry* (1), where it was held that as regards suits instituted before the 1st of April, 1873, all applications in them, including application to execute a decree, are excluded from the operation of Act IX. of 1871. Even if that Act applied, the case does not fall under the section relied upon by the High Court. It ought to have been sect. 167, and not sect. 166. [SIR R. COUCH referred to *Maharajah of Burdwan* v. *Bulram Singh* (2).] Act XIV. of 1859, sect. 20, applies, but the Court ought to have taken a different starting point from which to calculate the three years period. Further, it was not open to the Respondent, after filing petitions in the subsequent proceedings, which virtually admitted the pendency of the execution and the liability, to raise this plea of limitation which she had in effect abandoned. And when the Appellant made his application of the 23rd of July, 1873, there was a judicial exercise of determination that further proceedings in execution should be allowed. Any objection thereto should have been taken at the time. [SIR ROBERT P. COLLIER referred to *Hira Lall* v. *Budri Dass* (3).]

Woodroffe, for the Respondent, admitted that Act IX. of 1871 did not apply, but contended that sect. 22 and not sect. 20 of Act XIV. of 1859 was applicable. The decree in question was a summary decision, see Act XX. of 1866, sect. 52 and 53. It differs from an ordinary or regular decree; its holder is entitled to what is mentioned in the Act and nothing more. For instance, such a decree cannot establish a lien or even provide for interest after decree: see *Asma Bibee* v. *Ram Kant Roy Chowdry* (4).

(1) Law Rep. 8 Ind. App. 123.
(2) 5 Beng. L. R. 611; 13 Moore's Ind. App. 479.
(3) Law Rep. 7 Ind. App. 167.
(4) 19 Suth. W. R. 251.

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There is no appeal in sect. 55, though execution may be set aside. Even if the decree does not fall within sect. 22 of the Act of 1859, if the Act applies at all *bona fides* must be proved, it must be shewn that the applications for execution prior to the last were made *bonâ fide*, and with a view to enforce or keep the said decree in force. As the Court applied the Act of 1871 it did not go into the question of *bona fides*. Reference was also made to *Adur Monee Debia* v. *Koolo Chunder Chatterjee* (1); *Bhikambhat* v. *Fernandez* (2); *Ram Dhun Mundul* v. *Ramessur Bhuttacharjee* (3). Supposing that execution was not barred, still this decree was not one of which execution could legitimately have been ordered: see sect. 210 and sect. 216 of Act VIII. of 1859; *Mirza Mahomed Aga Ali Khan Bahadoor* v. *Widow of Balmakund* (4). Notice was necessary calling upon the debtor to shew cause why execution should not issue, creditor did nothing. As regards the order of the 3rd of August, 1870, see *Bissesshur Mullick* v. *Maharajah Mahatab Chunder Bahadoor* (5); *Maharajah of Burdwan* v. *Bulram Singh* (6); *Ram Sahaye Singh* v. *Degan Singh* (7); *Rughoonundun Ram* v. *Somessur Panday* (8). As regards estoppel, *res judicata* does not apply to proceedings in execution: see *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (9).

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal is whether the execution of a decree obtained in the Court of the Principal Sudder Ameen of *Moorshedabad*, by *Dhunput Singh* against *Gopal Chand*, is barred by the law of limitation. The Appellant is the holder of the decree by assignment from *Dhunput Singh*. The Respondent is the mother

(1) 21 Suth. W. R. 140.
(2) Ind. L. R. 5 Bom. 673.
(3) 11 Suth. W. R. 117.
(4) Law Rep. 3 Ind. App. 246.
(5) 10 Suth. W. R. 10, F. B. 8.
(6) 13 Moore's Ind. App. 479.
(7) 6 Suth. W. R. Misc. 98.
(8) 22 Suth. W. R. 235.
(9) Law Rep. 8 Ind. App. 123.

of *Gopal Chand*, and on the death of his minor son *Gopi Chand* succeeded as the heir of her grandson to the possession of the property which has been attached in execution. The decree was obtained on a mortgage bond, dated the 25th Cheyt 1273 (6th of April, 1867), for Rs.9995, which sum was to be repaid with interest, at the rate of 2 per cent. per mensem, in the month of Jeyt, 1274. The bond contained an agreement that it should be specially registered under the provisions of sect. 53 of Act XX. of 1866. It was presented for registration on the 7th of June, 1867, and was registered and the agreement recorded on the 19th, the time fixed for payment having expired on the 13th of the same month.

Act XX. of 1866 provides (sect. 52) that,—

"Whenever the obligor and obligee of an obligation shall agree that, in the event of the obligation not being duly satisfied, the amount secured thereby may be recorded in a summary way, and shall at the time of registering the said obligation apply to the registering officer to record the said agreement, the registering officer after making such inquiries as he may think proper shall record such agreement at the foot of the indorsement and certificate required by sects. 66 and 68 of the Act, and such record shall be signed by him and by the obligor, and shall be copied into the register book, and shall be *primâ facie* evidence of the agreement.

"Within one year (sect. 53) from the date on which the amount becomes payable, or where the amount is payable by instalments within one year from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act, No. XVI. of 1864, or under this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered.

"On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any)

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to the date of the decrees and a sum for costs to be fixed by the Court.

Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure."

On the 9th of July, 1867, *Dhunput Singh* obtained a decree under this Act in the following terms:—"That the suit be decreed, and the Plaintiff do recover the amount of the claim with interest during the pendency of the suit, and costs of the Court, together with interest up to the date of realization at the rate of one rupee per mensem from the property pledged and the Defendant." The latter part of this decree is not authorized by the Act, but it will not be material to consider this.

Gopal Chand died some time before May, 1870, but at what precise time does not appear in the proceedings. He left a minor son, *Gopi Chand*, and on the 10th of May, 1870, the first application was made for execution of the decree. This was made by *Dhunput Singh* to the Court of *Moorshedabad* against himself, described as guardian and surburakar on behalf of *Set Gopi Chand*, minor, son and heir of *Set Gopal Chand*. It does not appear how he came to be guardian, except that in a petition of the Respondent to the Court of *Nuddea*, which will be afterwards referred to, it is said that he was, according to the arrangement made by *Gopal Chand*, appointed guardian of *Gopi Chand*. On the 11th of May it was ordered that the petition be registered, and the decree holder do deposit the cost of service of notice on the judgment debtor within seven days. This was merely a formal order, as *Dhunput Singh* was himself the person on whom the notice would be served.

It will be convenient now to consider what was the effect at this time of the law of limitation.

By Act XIV. of 1859, sect. 20, it is enacted—

"That no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court unless some proceedings shall have been taken to enforce such judgment, decree, or order, or to keep the

same in force within three years next preceding the application for execution."

And by sect. 22,—

"No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter, or of any revenue authority, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding application for such execution."

The Court of *Moorshedabad* was not established by Royal Charter. Their Lordships are of opinion that sect. 20 was intended to apply to decisions, whether they might be called judgments, decrees, or orders, made in a regular suit, and sect. 22 to all other decisions. Act XX. of 1866 does, indeed, say that the Petitioner shall be entitled to a decree, and that such decree may be enforced under the provisions for the enforcement of decrees contained in the Code of Civil Procedure; but sect. 52 says that the amount secured by the obligation may be recovered in a summary way. Summary decision means a decision arrived at by a summary proceeding, which this certainly is, and the decision being called a decree does not make any difference in this respect. It was held by the High Court at *Calcutta*, in *Ram Dhun Mundul* v. *Ramessur Bhuttacharjee* (1), that the words "summary decision or award" meant a decision of the Civil Courts not being a decree made in a regular suit or appeal. This construction appears to have been adopted by the Indian Legislature in the *Limitation Act*, No. IX. of 1871, in art. 166 of the second schedule, where one year is stated as the period of limitation for the execution of the decision (other than a decree or order passed in a regular suit or an appeal) of a Civil Court or an appeal. Here the exception shews that the word "decision" is used as including a decree. Therefore the first application for the execution of this decree was barred by the law of limitation.

It remains to be seen whether in the subsequent proceedings the Respondent has become estopped from relying upon this, They may be briefly stated. On the 20th of July, 1870, *Dhunput*

(1) 11 Suth. W. R. 117; 2 Beng. L. R. 235.

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Singh applied to the *Moorshedabad* Court that the decree might be executed in the Court of the district of *Nuddea*. The Court, adverting to the fact that the decree holder was himself the guardian of the minor judgment debtor, on the 3rd of August, 1870, made an order that he "do recover the money due to him from the estate of the minor, with the permission of the Judge, or else by appointing another guardian on behalf of the minor, do take proper steps to carry on this execution proceeding in his presence within ten days." On the 29th of August, 1870, by an order reciting this order, and that no steps had been taken, it was ordered that the case be struck off for default. On the 23rd of July, 1873, *Dhunput Singh* and the Appellant presented petitions to the *Moorshedabad* Court stating that the decree, along with other decrees, had been sold by *Dhunput Singh* to the Appellant for Rs.1000, and praying that she might be substituted for him, and the amount of the decree ordered to be paid to her. The Appellant is the wife of *Dhunput Singh*, but this was not stated in the petitions. The object seems to have been to avoid complying with the order of the 3rd of August, 1870. On the 28th of August the substitution was ordered. On the 12th of December, 1873, it was ordered "that for want of prosecution on the part of the decree holder this case be struck off for the present." The next step was an application on the 22nd of September, 1874, on the part of the Appellant for execution of the decree in the district of *Nuddea*, which was ordered on the 7th of December, 1874. On the 9th of April, 1875, this application was registered in the *Nuddea* Court, and, on the 4th of August, 1876, it was struck off in default. On the 25th of January, 1878, another application for execution was made to the *Nuddea* Court. *Gopi Chand*, the minor, died in November, 1878. The application to the Court, which became necessary on his death, either under sect. 210 of Act VIII. of 1859, or sect. 234 of Act X. of 1877, the new Civil Procedure Code, whichever might, according to sect. 3 of Act XII. of 1879, be applicable, was not made. Notwithstanding this omission the execution proceedings appear to have been continued, for there is in the proceedings a petition, dated the 8th of December, 1879, of the Respondent by *Umanath Ghosal*, described as pleader for the Petitioner, stating

that the decree holder had executed the decree against her, got her property attached, and that day had been fixed for the sale, and praying that two months' time might be sanctioned, and, the attachment subsisting, the 8th of February next might be fixed for the sale. This was assented to by the pleader for the Appellant, and an order was made accordingly. On the 9th of February, 1880, another petition of the Respondent was presented by *Nobin Chunder Sircar*, another pleader, stating that the decree holder had consented to allow time up to the 1st of March, and praying that that day might be fixed for the sale, which was ordered with the consent of the pleader for the decree holder. On the 8th of March part of the attached property was sold, and the petition of the Respondent to the *Nuddea* Court to set aside the execution having been rejected on the 6th of March, and an order made for a further sale on the 8th of May, the Respondent, on the 3rd of May, 1880, petitioned the *Moorshedabad* Court to stay the sale, and adjudicate upon the objections (among others which need not be mentioned) that the execution of the decree was barred by limitation, and the proceedings in execution had been without jurisdiction. And she denied that she knew of the proceedings. The Appellant, in his petition in answer, relied upon the petitions of the 8th of December and 9th of February. The Subordinate Judge of *Moorshedabad* rejected this petition, and there was an appeal to the High Court. That Court applied to the case the *Limitation Act*, No. IX. of 1871, art. 167 of which gives, in the decree or order of a Civil Court not established by Royal Charter, three years from the date of applying to enforce or keep it in force as the period of limitation, and held that the question was whether, within three years before the 23rd of July, 1873, anything had been done to enforce or keep in force the decree. They allowed the appeal, on the ground that no application for execution had been made within three years; but, it having since been decided by this committee, in *Mungal Pershad Dichit and Another* v. *Grija Kant Lahiri Chowdhry* (1), that, as regards suits instituted before the 1st of April, 1873, all applications in them are excluded from the operation of Act IX. of 1871, it is admitted that the decision cannot be sustained on that ground.

(1) Law Rep. 8 Ind. Ap. 123.

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It does not seem to have been considered whether art. 166 was not applicable. It has been held to be applicable to such a case by the High Court of *Bombay* (1).

Their Lordships observe that, although the Respondent denied any knowledge of the petitions presented in her name, and the Appellant relied upon them, no evidence was given that they were authorized by her, and further, that the proper steps consequent upon the death of *Gopi Chand* not having been taken in the *Moorshedabad* Court, the *Nuddea* Court had no authority to execute the decree against the Respondent. The petitions are of a very suspicious character, and their object appears to have been to have a sale without proclamation. The proceeding in the *Nuddea* Court against the Respondent was altogether irregular, if it was not without jurisdiction, and the petitions to postpone the sale cannot be treated as an estoppel. They contain no admission that the decree could be legally executed against the Respondent, and are not within the description of an estoppel given in the *Indian Evidence Act*, 1872, sect. 115, and following sections.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court by which the order of the Lower Court was set aside and the application for execution dismissed, should be affirmed, and this appeal be dismissed, and the costs will be paid by the Appellant.

Solicitor for Appellant: *T. L. Wilson.*
Solicitors for Respondent: *Henderson & Co.*

(1) Ind. L. R. 5 Bom. S. 673.

SITUL PERSHAD . . . . . PLAINTIFF; J. C.*

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LUCHMI PERSHAD SINGH AND OTHERS . DEFENDANTS. *June* 28, 29.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Construction—Pottah and Ikrarnamah—Conditional Contract to repurchase not a Mortgage.

Where by a pottah and ikrarnamah of even date land was granted in mokurruri on perpetual tenure as an absolute acquittance of a specified sum due by the grantor, and it was stipulated that when the grantor or his heirs paid off the said sum without interest from their own pocket without taking money from any other person to the grantee or his heirs, then that the pottah should be returned, the grantor having no claim for mesne profits:—

Held, that the transaction was not a mortgage, but evidenced a sale, the acquittal of a debt, and a power of repurchase by the vendor under certain conditions personal to himself.

APPEALS from two decrees of the High Court (July 21, 1880) affirming two decrees of the Subordinate Judge of *Bhagulpore* (July 2, 3, 1879).

The first arose out of a regular suit brought by the Appellant; the second out of certain execution proceedings taken by the Appellant to enforce a decree against one *Chucknarain* deceased, in which the Respondent *Luchmi Pershad* intervened as an objector.

The question decided in this appeal is whether the Appellant, as purchaser of *Chucknarain's* interest in certain villages in suit, of which villages *Chucknarain* had executed a mokurruri lease to *Ramchurn Singh* the father of *Luchmi Pershad*, had by reason of his purchase acquired the right to treat that lease as in fact a mortgage, and to redeem those villages on payment of a certain sum of money.

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Leith, Q.C., and *Woodroffe* (*Otool Chunder Mullick* with them), for the Appellant, contended that the transaction between *Chucknarain* and *Ramchurn Singh* was one of security, and not a mere grant of a perpetual lease on the payment of a premium with a condition for surrender on repayment. The right of repurchase was according to the terms of the ikrarnamah to be on the footing of redemption. It was not of a purely personal character, exercisable only by *Chucknarain* and his heirs, but was one of which a purchaser of *Chucknarain's* interest could avail himself. Any conditions excluding such purchaser would be void. Reference was made to *Story's* Equity Jurisprudence [12th ed.], vol. ii. p. 197, 104, 123; *Arman Koonwar* v. *Naurutton Pande* (1); *Dookchore Rai* v. *Hajee Hidayut-oollah* (2); *Rimmins* v. *Fletcher* (3); *Langlet* v. *Scawen* (4); *Achambit Singh* v. *Kesho Lal* (5); *London and South Western Railway Company* v. *Gomm* (6).

Cowie, Q.C., *Doyne*, *Mayne*, and *Cowell*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The sole question to be decided in both these appeals is whether the Plaintiff, in the first appeal as assignee, in the second appeal as execution creditor, of one *Chucknarain Singh*, derived from *Chucknarain* a right to redeem certain villages which he alleged to have been mortgaged by *Chucknarain*. On the part of the Respondents it is not disputed that if he is correct in his interpretation of these deeds, and the villages were mortgaged, he has the right which he claims. But it is contended that the deeds in question did not create a mortgage, but were a sale of the property with a provision for its repurchase on certain conditions personal to the mortgagor.

In order to determine this question it is necessary to consider the circumstances under which the two documents which are

(1) 3 Sel. Rep. 78.
(2) 4 Agra, H. C. F. B. 7.
(3) 14 Ch. D. 699, 708.
(4) 1 Ves. Sen. 402, 405.
(5) 20 Suth. W. R. 562.
(6) 20 Ch. D. 562.

relied upon, namely a pottah and an ikrarnamah of the 15th of January, 1864, were executed, as well as to examine the documents themselves.

The circumstances were shortly these: *Ramchurn* was the eldest of three brothers, *Chucknarain* being a half-brother of the other two. *Ramchurn* purchased a 14 annas share of some fifty-two villages in a zemindary in the joint names of himself and his two brothers. It was intended that he should have 10 out of the 14 annas, and that each of his brothers should have two annas. He paid the greater part of the purchase-money; the brothers paid a comparatively small part of it, and they were indebted to him. In order to recover that debt, amounting with interest to upwards of Rs.40,000, he brought an action, and obtained judgments against both of them for something more than Rs.20,000. These were the transactions between the brothers at the time of the deeds being entered into.

On the 15th of January, 1864, a pottah was entered into by *Chucknarain Singh*, in which he purports to grant in mokurruri on perpetual tenure, to his brother *Ramchurn*, his two annas share in the fifty-two villages, at an annual rental of Rs.497. The deed contains these recitals. It speaks of the sum of Rs.30,005 as the consideration or peshkas nuzurana money, "out of which," *Chucknarain* says, "I have taken Rs.10,000 in cash for payment of the debt due to *Baboo Ramchurn Lal Mahajun*" — that is another *Ramchurn*—"and the balance, Co.'s Rs.20,005, was paid on account of the decretal money, principal with interest, and costs incurred in the zillah Court and the Sudder Court, as contained in the decision of the Principal Sudder Ameen of zillah *Bhagulpore*, dated the 10th of September, 1861, which was confirmed by the decision of the High Court of *Calcutta*, dated the 10th of September, 1863, due to *Baboo Ramchurn Singh*, Plaintiff, decree holder, from me, the declarant, Defendant, judgment debtor, after deduction of Rs.1023 remitted out of the decretal money due to the said decree holder, and of the amount of costs incurred in the zillah Court, and also after deduction of one half of the decretal money due from *Baboo Chundi Pershad Singh*, second Defendant; and whereas a deed of acquittance of this date, with a receipt stamp affixed thereto, has been obtained by me from the said

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decree holder, I, the declarant, have from the beginning of 1271 Fusli, executed this pottah of perpetual mokurruri lease," and so on. The pottah, therefore, recites that this mokurruri lease was given upon an absolute acquittance of the debt, and not as a security for its payment.

The ikrarnamah of the same date must now be taken to be in these terms (there has been a dispute about the terms, which it is not necessary now to refer to). It was stipulated between the contracting parties that when *Baboo Chucknarain Singh*, or his heirs, paid off the said nuzurana money of Rs.30,000, without interest, from their own pocket, without taking money from any other person, to *Baboo Ramchurn Singh* and his heirs, then *Baboo Ramchurn Singh*, or his heirs, would without demanding interest, return the said pottah or perpetual lease to the said *Baboo Chucknarain Singh*, and *Chucknarain Singh* should have no claim in respect of the mesne profits for the period of the mokurridar's possession.

Now the question is whether, as contended by the Appellants, these documents, though they purport on the face of them to be a sale with a power of repurchase, really amount to a mortgage, or whether, as contended by the Respondents, the real intention of the parties was that which appears upon the face of them; namely, that there should be a sale, that the debt should be acquitted, and that there should be a power of repurchase under certain conditions personal to *Chucknarain*.

Both Courts have found in favour of the contention of the Respondents. Such finding, in the first place, is entirely consistent with the terms of both documents. The opposite finding would not be consistent with the terms of either, certainly not with the terms of the pottah, which speaks of the debt having been acquitted and discharged. To hold that it was not acquitted and discharged, but that these documents were really a security for it, would be to contradict the terms of the instrument.

Then, again, looking at the surrounding circumstances, among other things, at the value of the property, which appears to have been fairly ascertained, and at the relation of the parties, their Lordships are of opinion that the Courts have come to the right conclusion, that this transaction is in fact what it purported to be,

and there is no sufficient ground for holding it to be what it did not purport to be, namely, a mortgage.

Under these circumstances their Lordships will humbly advise Her Majesty that these appeals be dismissed and the judgment be affirmed. The Appellant must pay the costs of the appeals; but as they have been consolidated, there will be only one set of costs.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondent: *Barrow & Rogers.*

NAJBAN BIBI . . . . . DEFENDANT;

AND

CHAND BIBI . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF SITAPUR, OUDH.

Construction—Gift by way of Maintenance resumable—Tribal Custom.

Case in which it was held upon the evidence that according to tribal custom a gift or lease by way of maintenance was resumable at the will of the grantor.

APPEAL from a judgment of the Commissioner (March 26, 1879), affirming a decree of the Settlement Officer of *Kheri* (July 30, 1878).

On the 10th of September, 1877, the Plaintiff filed her suit in the Settlement Court of the *Kheri* District, and thereby claimed from the Defendant possession of four villages. The plaint stated that in 1859–60 the villages now in dispute were temporarily leased to Defendant, on favourable terms, for her support. That by a document which was called a will, dated the 6th of March, 1862, she (the Plaintiff), had bequeathed the whole of the property to her grandson, subject to the Defendant's right to

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continue to enjoy the said villages on favourable terms, but that by a codicil, dated the 14th of June, 1876, she had revoked so much of the will as contained the above clause in favour of the Defendant.

The case set up by the Defendant was, that she held the villages in dispute, not as a lessee under the Plaintiff, but by independent title as proprietor, under the will of her father *Madar Baksh Khan*, and by virtue of a division entered into by her brother *Asmatullah Khan* whereby these villages fell to her share. It was also alleged that, at the time of the summary settlement, the Plaintiff had dissuaded the Defendant from putting her own rights forward in respect of these villages and had become a trustee for her in respect thereof, by obtaining her consent that the Government arrangements should be made exclusively in the Plaintiff's name.

The First Court gave its decree for possession of the villages, as prayed. The Judge found that the Defendant had no independent title, and merely held from 1859 as lessee of the Plaintiff, under a lease granted for her maintenance, which he considered was resumable at pleasure. The Commissioner confirmed this decree.

Mayne, and *Theodore Thomas*, for the Appellant, contended that as she was in possession under a lease, it lay on the Respondent to shew that she was entitled to resume the villages at pleasure. There was no evidence as to the terms of the lease. The presumption from the facts of the case was that it was for life. Reference was made to Act XVII. of 1876, sect. 52.

Doyne, for the Respondent, was not called on.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

The single question in this appeal is whether a lease or gift made orally, and for indefinite duration, by one of the parties to the other, is a lease for life, or a lease or gift resumable either at the pleasure of the lessor or upon notice.

With respect to any difference between resumption at will and resumption upon notice no question has been raised, and it would seem, from the state of the pleadings, that no question could be raised; because in the plaint it is stated that the Defendant, who is the lessee, was informed by the lessor of her intention to cancel the lease, and that she resisted the action, and no issue is taken upon that statement.

The parties stand in the relation of mother and daughter, and the circumstances under which the gift was made are these: The mother is the talookdar of a talook containing a number of villages. The daughter married, and became a widow. For some time she lived with her husband's family. She then quarrelled with them, and it would seem that they deprived her of her share of the husband's property, upon which she came to her mother in destitute circumstances, and her mother gave her the property in question by way of maintenance. The parties belong to the tribe of the Ahbans, who appear to be Mahommedans, but with several customs of their own; and it would seem that their law of inheritance and their law of maintenance are tribal laws.

Now, in the first place, it is to be observed that the mother, the Plaintiff below, is only seeking to resume that which is a portion of her talook. *Primâ facie* she has a right to do that, and it is incumbent upon the person who is resisting the resumption to shew a good title against the talookdar. The question is, whether the Defendant, who sets up this gift or lease, has shewn such a title.

There was a great deal of evidence given in the Court below as to the customs of the Ahbans. The evidence principally related to the custom of inheritance, because the Defendant set up a title either by inheritance, or by the law of succession mixed up with the allegation of a will in her favour. Those issues have been found against her in the Courts below, and there is no dispute about them now. But besides the evidence of the customs which relate to inheritance or succession, several witnesses have said that where a gift is made by way of maintenance it is a gift resumable by the grantor. It appears to their Lordships that both Courts have found in favour of that evidence. There is none the other way. The only witness who speaks as

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to the non-resumability of such grants speaks of grants made to a daughter of the family by way of dowry and upon marriage. Both the Courts below, as their Lordships read the judgments, have found in favour of the power of resumption. The Settlement Officer says, speaking of the gift to the Defendant: "It is shewn to be now, and was so from the first, a lease to her for her maintenance, and therefore resumable at the pleasure of the proprietor of the estate." That is in accordance with the evidence; and their Lordships read that, not as a conclusion of law found by the Judge himself, but as his interpretation of the evidence. The Commissioner says this: First he finds that, according to the custom of the Ahbans, the Defendant would have no right to maintenance from her mother. He then adds: "Defendant has therefore no claim either by custom or by special necessity to the continuance of this grant, which it appears to me cannot be regarded as anything but a compassionate allowance for her maintenance, granted by her mother under peculiar circumstances, which now no longer exist." Then he goes on to say that if it had been made in money there could be no doubt that it could have been stopped, and it cannot make any difference that the mother had followed the common custom of giving a beneficial interest in land instead of an allowance in money. He further shews that the old native custom always recognised a right of resumption on the part of the talookdar even in cases of maintenance proper, though he says it was exercised with a great deal of discretion in a gradual and merciful way, so that the whole of the resumption did not fall upon a single generation. But, he argues, if the right of resumption existed in cases where there was a right to maintenance, much more would it exist in such a case as this, where there is no right to maintenance at all.

Therefore both Courts have found that by the tribal custom the right to resumption exists, and it appears to their Lordships that such is the fair effect of the evidence on the subject.

Then there is another piece of evidence which is not without bearing upon the Plaintiff's right to resume. In answer to the circular sent out by the Government to talookdars, desiring to know who were their successors, the Plaintiff followed the not

uncommon course of making what was called a will by way of pointing out to the Government who the successor was. In that will she appoints as her general successor her grandson, *Raza Husain*; but she states that "those entitled to any rights will continue to enjoy those respective rights in accordance with the details recorded herein." Then she goes on to say, "Until I die I have the right of revoking and confirming, and of decreasing and increasing, and of altering." So that, although she states that certain persons have rights, she at the same moment asserts her own right of altering those dispositions if she pleases. Now among those rights are four villages to be held by the Defendant, and it is stated again that "these four villages will remain with the Defendant with the Government jumma upon them," and so forth. There we have stated on the face of a formal document, put in for the purpose of informing the Government of the state of this talook that the talookdar then claimed the entire right of altering the disposition of these very four villages.

Such evidence is by no means conclusive, and under some circumstances it might be worthless, or even inadmissible. But in this case we have absolutely no evidence of the intention of the donor, which is contemporaneous with the gift. The will was made within two years, at the longest, after the gift, and many years before the events which led to its revocation. Under such circumstances a formal declaration by the donor as to the positions of herself and the donee with reference to the gift ought not to be disregarded.

In the year 1876 the Plaintiff made what is called a codicil to her will, and thereby revoked the gift to her daughter.

At that time the circumstances in which her daughter was had very much altered for the better, and the relations between the mother and the daughter had altered too, but for the worse. We have however no concern with the reasons given by the mother for altering her dispositions. The fact is that she claimed the full right of altering them, and she has chosen to do so. Having altered them she brought this action for possession, and it has been decided that she has the power of resumption. For the reasons above given their Lordships entirely agree with the decision of the Courts below.

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Something has been said as to the effect of sect. 52 of Act XVII. of 1876, the *Oudh Revenue Act*, but it does not appear to have been the ground of the decision in the Courts below, nor to have been much discussed, and their Lordships express no opinion about it.

The result is that the appeal should be dismissed with costs; and their Lordships will humbly advise Her Majesty to that effect.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitor for Respondent: *T. L. Wilson.*

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KALI KOMUL MOZOOMDAR AND OTHERS DEFENDANTS;

AND

UMA SHUNKUR MOITRA . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Adoption—Adopted Son is Heir to his adoptive Maternal Uncle.

An adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa; and takes by inheritance (according to the *Bengal* school) from his adoptive mother's relations, *e.g.*, her brother.

APPEAL from a Full Bench decision of the High Court (June 21, 1880), which reversed decisions of the Acting Additional Judge of *Rajshaye* (May 31, 1878), and of the Second Subordinate Judge of *Rampore Beauleah* (Dec. 20, 1877).

The Full Bench decided that the Respondent, as an adopted son, was entitled to inherit from the relations of his adoptive mother.

The facts are stated in the judgment of their Lordships.

The Respondent having been adopted by *Hurrosoondury* under authority from her deceased husband, sued on the 8th of December,

* *Present:*—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

1876, after the death of her mother *Bhobani*, to recover possession of property which had belonged to her father, and had then devolved by inheritance upon her brother *Mokoond*, at whose death *Bhobani* had succeeded to the ordinary estate of a Hindu widow therein. He based his title as the adopted son of *Hurrosoondury*, and the nearest heir to his adoptive maternal uncle *Mokoond*, in respect of property which had originally belonged to his maternal grandfather.

The judgment of the High Court (*Garth*, C.J., *L. S. Jackson*, *Morris*, *Mitter*, and *Tottenham*, JJ.), was delivered by Mr. Justice *Romesh Chunder Mitter*, and was as follows:—

"I think that the question referred to us should be answered in the affirmative. An adopted son, according to Hindu law, takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son.

"According to Hindu law an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter, as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family *as if* he were born in it.

"*Nanda Pandita*, in the Dattaka Mimansa, section VI., pars. 50, 51, and 52, after laying down that the ancestors of the adoptive mother are the maternal ancestors of the adopted son, on the authority of certain Rishis mentioned therein, in par. 53 supports that opinion thus, upon general grounds: 'And this even is proper. The adopted son, as substitute for the real legitimate son, being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the manes in honour of whom *a legitimate son* performs such repasts. *For without difference relation to the father, and the other sires of the adopter obtains.*' The original of this passage is more clear upon this point. A more faithful translation of it would be as follows: 'For without difference relation to the father's family, &c., obtains.'

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"The author here, quite irrespective of the chapter and verse of Rishis, whom he quotes in pars. 51 and 52, supports his position on general grounds, and says that there is no difference between an adopted son and a legitimate son in respect of his relationship to his adoptive 'father's family, &c.;' which words evidently, according to the author, indicate his (the adopted son's) relationship to the ancestors of the adoptive mother.

"The cases in which there is a difference are all accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. It would not have been necessary to define accurately the points of difference, if in all other respects the position of an adopted son had not been exactly similar to that of a legitimate son.

"Apart from this general ground, there is a clear and express text in the Dattaka Mimansa, which is cited below, shewing that a child after adoption is not only completely severed from his own father's family, but also from his own maternal grandfather's family, and that he by substitution becomes connected to his adoptive father and mother's family, as if they were his natural parents.

'"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons).'"—Dattaka Mimansa, section VI. p. 50.

"This case is governed by the authorities of the *Bengal* school; and it is now settled that the law of inheritance in this school is based substantially upon the theory of spiritual benefits: see *Guru Gobind Shaha Mandal* v. *Anand Lall Ghose Mozomdar* (1).

"There is abundant authority, both in the Dattaka Chandrika and the Dattaka Mimansa, to establish that an adopted son confers on the father of the adoptive mother the same spiritual benefit which a legitimate son does.

"Speaking of the parvana rite—(the right which is chiefly taken into consideration on the question of spiritual benefit)—the author of the Dattaka Chandrika, in par. 17, section III., says: 'But the absolutely adopted son presents oblations to the father, and the other ancestors, of his adoptive mother only.'

"On this subject the author of the Dattaka Mimansa says: 'As

(1) Full Bench Decision, 5 Beng. L. R. 15.

for what is said by *Hemádri*, that the precept enjoining the performance of a funeral repast in honour of the maternal grandfather refers to the natural maternal grandfather, that is inaccurate; for it is at variance with the passage—"of him who has given away his son, the obsequies fail." Nor is the capacity of the maternal grandsires, as givers, wanting; for by reason of their affording their assent to the gift (as appears from this passage—"having convened his kindred, &c.") they also are parties to the same. Besides, by this passage—'the funeral cake follows the family and estate,' the family and estate are declared to be the cause of performing the funeral repast; and the estate of the maternal grandfather also, like that of the father, lapses from the son given. His incapacity to perform a funeral repast in honour of his original maternal grandfather is properly declared."'—Dattaka Mimansa, section VI., p. 51.

"'Accordingly, *Hemádri* himself, from not being satisfied with that (just stated), has advanced the other position: "In the same manner, as for the secondary father, a funeral repast must be performed in honour of the secondary maternal grandfather, and the rest."'—Dattaka Mimansa, section VI., par. 52.

"It is, therefore, clear that the adopted son confers the same spiritual benefit upon the relatives of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original mother. That being so, it would accord with the dictates of natural justice, as well as with the principles upon which the law of inheritance in the *Bengal* school is based, to hold that an adopted son succeeds to the property of the relatives of his adoptive mother in the same way as a legitimate son.

"In par. 51, section VI., of the Dattaka Mimansa, quoted above, *Nanda Pandita*, citing the text of *Manu*, 'the funeral cake follows the family and estate,' says that the family and estate are declared to be the cause of performing the funeral repast; and he argues from it 'that the estate of the maternal grandfather also, like that of the father, lapses from the son given.' Exactly the same process of reasoning leads to the conclusion that the adopted son, losing his right of inheritance in the family of his original father and maternal grandfather,

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acquires similar rights in the family of his adoptive father and maternal grandfather. Because the family estate is declared to be the *cause* of performing the funeral repast. The adopted son is, as shewn above, bound to perform the funeral repasts in honour of the manes of his adoptive mother's ancestors. Therefore, the cause of this obligation, viz., the right to inherit their estate, must follow.

"In the Dattaka Chandrika the right of the adopted son to take by inheritance from the relatives of his adoptive mother is declared in clear words.

"After referring to certain contradictory texts of the ancient Rishis upon this subject, the author proceeds to reconcile them thus:

"'In the same manner the doctrine of one holy saint, that the son given is an heir to kinsmen, and that of another, that he is not such heir, are to be reconciled by referring to the distinction of his being endowed with good qualities, or otherwise. By reason of succeeding to the estate of sapinda kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen: and on account of the particle "only" in the phrase "of the father only" (occurring in the passage subjoined) from inheriting merely of the father, he is (argued by the other not to be) such heir. Of these the first six are heirs to kinsmen, the other six of the father only.'—Dattaka Chandrika, section V., par. 22.

"'And thus (the objection of) variation from the son given being enumerated higher and lower in the order of inheritance and so forth, by different holy saints respectively, is obviated by the distinction as to his qualities good and bad.'—Par. 23.

"'Therefore, by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist, (the adopted son) takes the whole estate even.'—Par. 24.

"The words 'other kinsmen' in par. 24 clearly indicate sapinda kinsmen, because in par. 22 the author expressly says, that 'by reason of succeeding to the estate of sapinda kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen.'

"Now, if the brother of the adoptive mother be a sapinda

kinsman of the adopted son, then there cannot be any doubt that, according to this express authority, the latter inherits to the estate of the former.

"According to the author of the Dayabhaga, the leading authority in the *Bengal* school, there cannot be any doubt that a maternal uncle is a sapinda of his sister's son.

"This is clearly laid down in par. 19, sect. 6 of chapter XI. of the Dayabhaga. The translation of this passage, as made by Mr. *Colebrooke*, with great deference to him, seems to me not to be strictly accurate. The correct rendering of this passage is as follows:—

"'Therefore, a kinsman, whether sprung from the family (of the deceased), though of different male descent, as his own daughter's son, or his father's daughter's son, or sprung from a different family, as his maternal uncle, or the like, being allied by a common funeral cake (pinda) on account of their presenting offerings to three ancestors in the paternal and the maternal family of the deceased owner, is a sapinda.'

"Therefore, as a legitimate son, being a sapinda of his maternal uncle, takes by inheritance from the latter, so does an adopted son inherit the estate of his maternal uncle by adoption under the express words of par. 24, cited above.

"But it has been contended on behalf of the Respondent that though the author of the Dayabhaya has, by an extension of the definition of the word 'sapinda,' included in that class persons sprung from a different family and connected by a common 'pinda,' yet, according to its ordinary signification, as understood by the majority of the Hindu lawyers, it is limited to agnates, or persons connected with the deceased through an unbroken line of male descent.

"It is true that many Hindu lawyers use the word 'sapinda' in this restricted sense, and it seems to me that the whole strength of the case on behalf of the Respondent lies in this contention.

"We have, therefore, to determine in what sense the word 'sapinda' is used both in the Dattaka Chandrika as well as in the Dattaka Mimansa.

"In sect. 1, par. 1, the author of the Dattaka Chandrika, after laying down, on the authority of *Saunaka*, 'that the adoption of

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a son by any Brahmin must be made from amongst sapindas,' says in par. 11, 'that by the use of the word sapinda in its general sense, it is meant from such, both of the same or a different family . . .' Similarly, in the Dattaka Mimansa (section XI. par. 3), the same text of *Saunaka* being cited, the following observation is made: "From amongst sapindas, that is, amongst such kinsman extending to the seventh decree inclusive; and the term being used in its general sense, it follows, *from among such kinsmen belonging to the same or a different general family* (gotra). Dattaka Mimansa, section XI, par. 3.

"These passages leave no room for doubt that both the Dattaka Chandrika and the Dattaka Mimansa held that, according to the general sense of the term 'sapinda,' it would include both agnates and cognates related by a common oblation.

"It is clear, therefore, that according to the authority of both these treatises on the law of adoption, which treatises have been always accepted throughout *India* as conclusive on questions relating to it, an adopted son takes by inheritance from the relatives of his adoptive mother.

"The learned pleaders on behalf of the Respondent relied upon the authority of the Dayabhaga and on a certain gloss of *Kulluka Bhatta* on a particular passage of *Manu*, defining the rights of an adopted son. Exactly the same contention was raised before a Division Bench of this Court in the case of *Raghubanand Doss* v. *Sadhu Churn Doss* (1), where a somewhat similar question was under consideration. In my judgment in that case, I have fully given my reasons for overruling it. It is, therefore, unnecessary here to repeat the same grounds.

"Therefore, it is clear to me, that upon the original works on Hindu law, the weight of authority preponderates in favour of the contention that an adopted son succeeds to the estate of the relatives of his adoptive mother in the same way as a legitimate son.

"Of the European text-writers, the opinions of Sir *T. Strange* and Mr. *Sutherland* are in favour of the adopted son's rights. In *Macnaghten's* Hindu Law, vol. i., p. 78, the contrary view is expressed on the authority of the case of *Gungamoyi* v. *Kishen*

(1) Ind. L. R. 4 Calc. 538.

Kishore Chowdhry (1). But this decision, as I shall presently shew, is not any authority upon the point under consideration.

"There are very few decided cases bearing upon the question referred to us. The earliest case upon the subject is to be found in *Macnaghten's* Hindu Law, vol. ii., p. 88. The decision there was in favour of the right of the adopted son. In a foot-note to that case, Mr. *Macnaghten* apparently approved of the pundit's opinion, upon which the decision was based.

"The case of *Gungamoyi* v. *Kishen Kishore Chowdhry* (1) upon which the opinion of Mr. *Macnaghten* referred to above is based, is, as already stated, not a decision in point. There one of two brothers died, leaving him surviving a widow and a daughter. In respect of his share, the daughter, after the death of the widow, sued the surviving brother, who set up a gift made by the widow in accordance with an alleged direction left by the deceased.

"The daughter also alleged (most unnecessarily for the purposes of that case), that she had received from her husband authority to adopt, which she had not till then exercised.

"One of the questions referred to the pundit was whether, after the death of the daughter, her adopted son, should she leave one, would succeed to the property of her father. The pundit answered this question in the negative. But as it did not actually arise in that case, and as the right of the daughter to succeed to her father's estate was unquestionable, the Court, on finding the alleged gift not established, passed a decree in her favour, without expressing any opinion on the question of the adopted son's right. Mr. *Macnaghten* was, therefore, mistaken in supposing that this case decided that an adopted son cannot succeed to the estate of his adoptive mother's relatives.

"In *Gunga Pershad* v. *Brojeswari Chowdhrani* (2) the converse of the case before us arose. The question in that case was, whether the brother's son of the adoptive mother could succeed to the property left by his father's sister's adopted son. Upon the pundit's opinion taken in that case, it was decided that he could The case of *Gungamoyi* seems to have been cited, but it was considered to be not in point.

"Then comes the case of *Morunmoyi Debia* v. *Bijoy Kishto*

(1) 3 Sel. Rep. 128. (2) S. D. of 1859, 1091.

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Gossamee (1), upon which the Respondents' pleaders strongly rely. There the very question referred to us distinctly arose, and was decided against the right of the adopted son. The texts of the Dattaka Chandrika and the Dattaka Mimansa extracted above, were not cited. The learned Judges were of opinion that the case of *Gunga Pershad* (2) was not in point, and based their decision mainly upon the authority of *Gungamoyi* v. *Kishen Kishore Chowdhry* (3). This latter decision, as already shewn, is not an authority upon the point, and it seems to me that, although in *Gunga Pershad* v. *Brojeswari Chowdhrani*, the converse question arose, that case *virtually* decided the point now under our consideration. If *A.* is established to be the maternal grandfather of *B.*, it follows, as a matter of course, that *B.* is related to *A.* as his daughter's son. The case of *Gunga Pershad* v. *Brojeswari Chowdhrani* in effect established, that an adopted son is related to the relatives of his adoptive mother as a son actually born of her. If the relationship is established, the rights and privileges which the law of inheritance attaches to it, follow as a matter of course. The learned Judges in the case of *Morunmoyi Debia* v. *Bijoy Kishto Gossamee* (I say with due deference to their opinion) were wrong both in relying upon *Gungamoyi* v. *Kisto Kishore Chowdhry* in support of their decision, as well as in distinguishing the case of *Gunga Pershad* v. *Brojeswari Chowdhrani* from the one under their consideration. The *Madras* High Court, in *Chinnaramakristna* v. *Minatchmi Ammal* (4), followed the ruling in *Morunmoyi* v. *Bijoy Kishto*, although the learned Judges who decided that case were of opinion that that ruling was opposed to the law, as laid down in the Dattaka Mimansa. On the other hand, a Full Bench of the *Allahabad* High Court in *Shamkuar* v. *Gayadin* (5), refused to follow it, and laid down the law in favour of the adopted son's rights. These are all the cases upon the point referred to us, and it seems to me that the weight of authority proponderates in favour of the proposition that an adopted son, according to the true interpretation of the Hindu law prevailing in *Bengal*, takes by inheritance from the relatives of his adoptive mother.

(1) Suth. W. R. F. B. 121.
(2) S. D. of 1859, 1091.
(3) 3 Sel. Rep. 128.
(4) 7 Madras, H. C. 245.
(5) Ind. L. R. 1 Allah. 255.

"The judgments of the Lower Courts will, therefore, be reversed, and the Plaintiff will be entitled to the share which he claims in the property mentioned in" with costs in all the Courts."

Graham, Q.C., and *Doyne*, for the Appellants, after contending that upon the evidence the permission to adopt was not satisfactorily made out, and therefore that the adoption was illegal and void, argued that the Respondent, if shewn to be a son of *Joy Sunker Surma*, duly adopted under a power granted by him, was not under the Hindu law of *Bengal* entitled to succeed to the estate of the brother of *Hurrosoondury*, his adoptive mother. Reference was made to *Pudmacoomari Debia* v. *The Court of Wards* (1). The present case is distinguishable. In the former case the claim was to succeed to the adoptive father's grandson through a daughter; in the present the claim is to succeed to the adoptive mother's brother. The former decision must be construed *secundum materiem subjectam*. Reference was made to *Mayne's* Hindu Law (1st ed.), sect. 148. Adoption is the father's act, though if alive he associates one or more of his wives with him: see *Sutherland's* Synopsis. The adopted son is not heir in all the wives' families. Reference was made to *Morunmoyi Debia* v. *Bijoy Kishto Gossamee* (2).

Leith, Q.C., and *C. W. Arathoon*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This suit was brought by the Respondent against the Appellant to recover certain property which he claimed as an adopted son. The former full owner of the property was *Kristonath*, who died in 1815, leaving a widow, *Bhobani*, and a son, who died in the following year unmarried, and a daughter, *Hurrosoondury*, who was married to *Joy Shunkur Surma*, and died in April, 1872. *Bhobani* died on the 1st of December, 1873, and the Respondent claimed to be entitled to the property on her death, as having been

(1) Law Rep. 8 Ind. Ap. 229. (2) Suth. W. R. F. B. 121.

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adopted by *Hurroosoondury*, with the permission of her husband, who died in 1843. The Appellants are the sons of *Mothooranath*, the original Defendant, who died pending the suit. He was the nephew of *Kristonath*, and took possession of the property on the death of *Bhobani*.

It was satisfactorily proved that *Hurrosoondury* adopted the Respondent and performed the requisite ceremonies in 1854, having previously adopted a son, who died in October, 1853, and the questions in this appeal are:—

1. Whether *Hurrosoondury* had permission from her husband to adopt, which is required by the law of *Bengal;* and
2. Whether the Respondent, as an adopted son, can succeed to the property in suit.

The Subordinate Judge held that an authenticated copy of a written permission, purporting to be executed by *Joy Shunkar*, empowering *Hurrosoondury* to adopt three sons in succession, was admissible in evidence. The Appellate Court held that it was not admissible, as there was no evidence that a search was made for the original. It is not necessary to decide which is right, as their Lordships are of opinion that there is sufficient evidence of the permission without the copy. A hebanama, or deed of gift, executed by *Joy Shunkar* in favour of *Hurrosoondury* contains a statement that he had executed in her favour a deed of permission to adopt. In the deed by which the first adopted son was given in adoption by his mother to *Hurrosoondury* there is this passage:— "Your husband, *Joy Shunkur Moitra*, being without issue, gave you during his lifetime permission to adopt a son, and has since died." This deed is witnessed by *Mothooranath*. And in his deposition taken in the suit he admits that "the Respondent was treated and acted as a son to *Hurrosoondury*, calling her mother, and *Bhobani* grandmother, and *Mothooranath* himself 'mama' or maternal uncle, and he answered accordingly." There is, therefore, no ground for setting aside the findings of the Lower Courts that there was a valid adoption.

As to the second question, their Lordships have held in *Pudmacoomari Debia* v. *The Court of Wards* (1), that an adopted son

(1) Law Rep. 8 Ind. App. 229.

succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption. In that case the claimant was the adopted son of the maternal grandfather of the deceased, and it was argued for the Appellant that it was distinguishable from this case. But their Lordships laid down that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa. That this is the Hindu law is shewn by the careful examination of the authorities by the learned native Judge who delivered the judgment of the Full Bench of the High Court, which is the subject of this appeal. The Respondent claims to succeed as being the daughter's son, and consequently the heir of his maternal uncle at the death of the widow, which he would be if he were a natural born son, and as an adopted son he is in the same position. This is clear from the Dattaka Mimansa, sect. 6, p. 50, where it is said, "The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding paternal is equally applicable to maternal grandsires (of adopted sons)." Their Lordships are, therefore, of opinion that the decree of the High Court in favour of the Respondent is right, and they will humbly advise Her Majesty that it should be affirmed, and this appeal dismissed, and the Appellant will pay the costs of it.

Solicitors for Appellants: *Wrentmore & Swinhoe.*
Solicitor for Respondent: *T. L. Wilson.*

J. C.* 1883 June 20, 21; July 11.

ISRI DUT KOER AND OTHERS . . . . . PLAINTIFFS;

AND

MUSSUMUT HANSBUTTI KOERAIN AND OTHERS . . . . . DEFENDANTS

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Suit for Declaratory Decree—Act VIII. of 1859, *sect.* 15—*Objection thereto should be preliminary—Suit by Reversioner to declare Hindu Widow's Alienation void allowed—Hindu Widow's unexpended Income may or may not accrete to Husband's Estate.*

Held, in a suit instituted before the *Specific Relief Act* (Act I. of 1877), that although as a general rule a Plaintiff cannot obtain a declaratory decree unless he shews title to some consequential relief, yet it is subject to exceptions. A suit during the life of a Hindu widow by a Hindu entitled to the possession of land at her death to have an alienation made by the widow declared to be void except for her life is within such exceptions. Such a suit is recognised by law (see Act IX. of 1871, art. 124), and a strong case of inexpediency must be shewn to justify a Court in refusing declaratory relief therein. Such refusal should be made in a preliminary stage of the litigation, not by the Court of Appeal after issues of fact and law have been decided.

A widow's unexpended income from her husband's estate may be held in suspense, or become an accretion to her husband's estate. Where she has invested it and aliened the property so purchased, together with the original estate of her husband, for the purpose of changing the succession, *held*, that accretion was clearly established.

Held, that a daughter cannot by taking a release from her father's widows of their interest in his estate acquire an absolute estate transmissible to her heirs.

APPEAL from an order of the High Court (June 24, 1879), which reversed an order of the First Subordinate Judge of *Tirhoot* (Sept. 17, 1877).

The facts appear in the judgment of their Lordships. The parties were governed by the Mitakshara law.

The Subordinate Judge was of opinion that the whole of the property in suit must be taken to be ancestral property, because

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

purchases made by widows out of the profits of their husband's property are accretions thereto, and he accordingly gave the Appellants a declaratory decree.

The High Court, although inclined to the opinion that the widows could dispose of property purchased by themselves out of the profits of the parent estate, were of opinion that the question was one of great difficulty and importance, and ought not to be decided in a declaratory suit, or without reference to a full bench, and that assuming that the suit was not inadmissible as a declaratory suit, having regard to the terms of sect. 15, Act VIII. of 1859, and certain authoritative decisions explanatory thereof, still it was a discretionary matter, and in their discretion they would refuse the prayer and dismiss the suit.

The grounds upon which the High Court (*Ainslie* and *Broughton*, JJ.) proceeded appear in the following passage of Mr. Justice *Ainslie's* judgment:—

"It is unnecessary to go through all the cases on the subject of a Hindu widow's power of alienation. I have said enough to shew that the question now before us is one of great difficulty and importance, and one that could not properly be decided without a reference to a full bench. It seems to me that we ought not to allow this suit to be protracted, and great additional expense to be incurred, when it is quite possible that the widows, or one of them, may survive the Plaintiffs, so that the estate may never vest in them, and the decision arrived at may prove no bar to further litigation.

"The Privy Council have laid down the rule, that a Court should not entertain a suit under sect. 15, Act VIII. of 1859, when the object of it is to determine the title of the Plaintiff as next heir after the death of a female holder; and I am inclined to say that it also should not do so when the object is to determine the title of the next heir to take, as belonging to the estate of the last male holder, property which at his death did not in any shape form a part of it. But it is not necessary to go so far as this at present. For the purposes of this appeal it is sufficient to say that the Court will not, in a declaratory suit, decide intricate questions of law, when no immediate effect, and possibly no future effect, can be given to its decision, and when the postpone-

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ment of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the Plaintiff) will not prejudice his rights in any way."

C. W. Arathoon, for the Appellant, contended that the suit in question was one that could be entertained, notwithstanding that no consequential relief could be granted or was asked for. It fell within the exceptions to the general rule, and the Court in its discretion ought to grant a declaratory decree, and at least ought not to refuse it at a late stage of the proceedings after the investigation had been held and expenses incurred. Act IX. of 1871, art. 124, recognises a declaratory suit of this kind, and provides a twelve years period of limitation in respect of it from the date of the alienation. Reference was made to *Kathama Natchiar* v. *Dorasinga Tever* (1); *Gobindmani Dasi* v. *Shamlall Bysack* (2). The profits of her husband's estate in the hands of his widow are not stridhan. They accrete to the parent estate and cannot be aliened. A daughter is entitled to no more than a widow's estate and cannot acquire an absolute estate as releasee from the widows: see *Chotay Lall* v. *Chunno Lall* (3). There is no distinction in Hindu law between the *corpus* of the husband's estate and its accumulations.

J. H. Arathoon, for the Respondents, contended that there was nothing in the deed of gift on its true construction to shew that anything larger than a life interest was intended to be passed. Of course the widow could aliene that, and the suit was unnecessary. [SIR ARTHUR HOBHOUSE:—The absolute interest was intended to be conveyed.] A Hindu widow has power over the savings from her husband's estate, and can aliene them absolutely: see *S. M. Puddomani Dassi* v. *Dwarkanath Biswas* (4); *Soorjeemony Dossee* v. *Denobundhoo Mullick* (5); *Gonda Kooer* v. *Kooer Oody Singh* (6). The *Hindu Wills Act*, 1870, increased the widow's power of alienation: *Ramanund Kuar* v. *Raghunath Kuar* (7).

(1) Law Rep. 2 Ind. App. 169.
(2) Beng. L. R. Supp. Vol. 48.
(3) Law Rep. 6 Ind. App. 15.
(4) 25 Suth. W. R. 335.
(5) 9 Moore's Ind. App. 123.
(6) 14 Beng. L. R. 154, 159.
(7) Ind. L. R. 8 Calc. 783.

C. W. Arathoon replied, citing *Elberling* on Inheritance, sect. 183; *Strange's* Hindu Law, vol. i., p. 26; Dayabhaga, c. iv., sect. 1; Mitakshara, c. ii., sect. 11; *Bhugwandeen Dhobi* v. *Myna Baiee* (1); Vyavastha Darpana, p. 64; *Vivada Chintamani* on Separate Property of Women; *Chundrabulee Debia* v. *Brody* (2); *Nihal Khan* v. *Hur Churn Lall* (3); *Grose* v. *Amirtamayi Dasi* (4).

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

This is a litigation concerning the succession to the estate of one *Budnath Koer*, a Hindu who died towards the end of the year 1857. He left two widows *Hunsbutti* and *Chunderbutti* who are still living; and one child, the daughter of *Chunderbutti*, who was named *Dyji Ojhain*, and who has since died, leaving only a daughter. On the death of *Dyji* the collateral male relatives of *Budnath* became his presumptive heirs, subject to the interest of the widows. They are the Plaintiffs and the Appellants. The Defendants and Respondents are the two widows and *Bachni* the daughter of *Dyji*.

On the 21st of December, 1873, the widows executed a deed whereby, after stating that with the exception of *Dyji* there was no heir of their husband or of themselves, they made a gift to her of certain lands and villages, only retaining to themselves a life interest in part of them. Some of the property is described as mouzahs exclusively acquired by the widows out of their own fund, and the rest is described as having been left by their husband *Budnath*.

Dyji died in the year 1875, and in the course of the next year the Plaintiffs brought their suit. The material parts of the prayer are for a decision that the deed of December 1873 is null and void as regards the reversionary interests of the Plaintiffs, and for a declaration that the properties acquired by the widows are part and parcel of their husband's estate.

By their written statements, and by the mouth of their pleader, the three Defendants set up in substance the same defence. They

(1) 11 Moore's Ind. App. 487.
(2) 9 Suth. W. R. 584.
(3) 1 Agra H. C. 219.
(4) 4 Beng. L. R. O. C. 1.

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say first, that the Plaintiffs having only a contingent interest cannot maintain the suit; secondly, that if a widow releases her interest to her husband's heir presumptive which *Dyji* was, the absolute interest becomes at once vested in such heir, and therefore the inheritance devolved on *Bachni;* thirdly, that at least the properties which were purchased by their own money, either received from their parents or given to them by *Budnath* during his lifetime, formed no part of *Budnath's* estate.

In the month of September, 1877, the case was heard and decided by the Subordinate Judge of *Tirhoot.* He found that the properties purchased by the widows were so purchased out of the profits of *Budnath's* estate, and were accretions to that estate. He held that the conveyance to *Dyji* did not vest the inheritance in her, because she was heir only to a woman's estate, and the prescribed course of inheritance would be changed if she took an estate transmissible to her own heirs. And he gave the Plaintiffs the decree they asked.

The Defendants appealed to the High Court, and in June, 1879, the case was heard by a Divisional Bench, consisting of Justices *Ainslie* and *Broughton,* who reversed the decree below and dismissed the suit with costs. From that decree the Plaintiffs bring the present appeal.

The learned Judges think that the first part of the Plaintiff's prayer cannot be entertained, because it is clearly competent to the widows to convey their own interest; because as regards *Budnath's* original property it is not necessary to construe the deed of 1873 as doing more; and because as regards the after-purchases the widows only convey such legal interest as they believe themselves to hold. Their Lordships are unable to follow this reasoning, even when confined to *Budnath's* original estate. The Defendants have not met the Plaintiffs by saying that by the conveyance *Dyji* got nothing more than the widow's interest; they have contended that by coalition with *Dyji's* inheritance it gave her an estate transmissible to her own heirs. If then the true construction of this transaction be that it passes only the widow's interest, it materially concerns the Plaintiffs to have that construction established. In this part of their prayer they ask nothing more favourable to themselves, and as between themselves

and the Defendants who allege an adverse construction, they are clearly entitled to as much, unless they are excluded by the rules relating to declaratory decrees.

The after-purchases fall under the same observations; and with respect to them two other substantial questions are raised, one of fact and one of law. First, the Defendants deny that they were made out of the proceeds of *Budnath's* property, and this issue has been decided against them in both Courts, and is no longer a matter of dispute. Secondly, they contend that such purchases are not to be treated as accretions to the property from the proceeds of which they were made, but belong to the widows who made them.

The learned judges below do not treat the latter question as unimportant to the Plaintiffs; but they consider it to be one of great difficulty, unsettled by authority, and requiring reference to a full bench. In their judgment therefore the case is not a proper one for a declaratory decree. Mr. Justice *Ainslie* states the principle of their decision as follows:—

"It seems to me that we ought not to allow this suit to be protracted and great additional expense to be incurred, when it is quite possible that the widows or one of them may survive the Plaintiffs, so that the estate may never vest in them and the decision arrived at may prove no bar to further litigation.

"For the purposes of this appeal it is sufficient to say that the Court will not, in a declaratory suit, decide intricate questions of law, when no immediate effect and possibly no future effect can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the Plaintiff) will not prejudice his rights in any way."

This suit was instituted before the passing of the *Specific Relief Act*, and its propriety must be tried by the law as it stood under sect. 15 of the Procedure Code of 1859. That section does not confer any right to declaratory relief in any given case, but merely enacts that no suit shall be liable to objection on the ground that a merely declaratory decree is sought, and that it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.

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It is true that the apparently wide door here opened for declaratory suits is greatly narrowed by the decision that, as a general rule, the Court shall not make a declaration except in cases in which the Plaintiff could if he chose seek some consequential relief. That doctrine was clearly laid down in the case of *Kathama Natchiar* v. *Dorasinga Tever* (1), but it was there stated to be subject to exceptions. Their Lordships think, and here they agree with the learned Judges below, that such a suit as the present falls among the exceptions.

It is laid down, and in their Lordships' opinion correctly, in *Shama Churn Sircar's* Vyavastha Darpana, that "if a widow, without consent of her husband's heirs, dispose of his property for purposes not sanctioned by law, they are entitled to interfere and prevent any such wrongful alienation by her." Yet it is clear that a widow may aliene her own interest. If then she executes a conveyance valid for her own interest but purporting to convey a larger interest to the grantee, it is difficult to see how the reversioner can get any relief except a declaration that the conveyance is void *pro tanto*. He cannot set the deed aside, because it is partly valid; nor can it affect the possession, which the widow has a right to keep or to give up to another. Such suits as the present one would seem to be, at least in many cases, the only practical mode of enforcing the heirs' right to interfere with a widow's alienation. That they are known to the law is clear, for Act IX. of 1871 by art. 124 prescribes the time for bringing a "suit during the life of a Hindu widow by a Hindu entitled to the possession of land on her death, to have an alienation made by the widow declared to be void except for her life." That is precisely the first part of the Plaintiff's prayer in this suit. And the person "entitled" must mean the presumptive heir who would be entitled if the widow died at that moment.

It is true that the foregoing considerations do not settle the case, for there remains a discretion in the Court, which may find it, as the High Court has found it, inexpedient to grant the relief asked. But their Lordships think that a strong case of inexpediency should be shewn for refusing declaratory relief to classes of persons expressly recognised by the law as suitors for

(1) Law Rep. 2 Ind. App. 169.

such relief. They do not say that there may not be such a case, but they cannot find it here.

The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of *Budnath*, as to which the Plaintiffs are clearly right and the Defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless; because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner, would be so strong an authority in point as probably to deter either party from disputing it.

Moreover, it is to be observed that objections resting on the difficulties of the dispute are of much more weight in a preliminary stage than in a Court of Appeal. If the Defendants had in the first instance objected to declaratory relief and had taken the opinion of the Subordinate Judge on that point, there would then have been more ground for refusing relief in order to save expense and litigation. But they did not do that. They disputed the whole case of the Plaintiff. An important issue of fact, and two important issues of law, were decided by the First Court in the Plaintiff's favour. After all this it comes very late for the Court above to reverse the action of the Court below on the ground of discretion and in order to save further litigation and expense.

For the above reasons their Lordships think that they are bound to decide the issues raised in this case.

So far as regards the contention of the Defendants that *Dyji* could by the conveyance take an absolute estate transmissible to her heirs, the High Court have not expressed any opinion adverse to that of the Subordinate Judge, and their Lordships need do no more than express agreement with him.

The difficult question of the after-purchases is very ably discussed by the learned Judges below, who would probably, if compelled to decide, have decided against the Plaintiffs. The

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difficulty is enhanced, if not created, by the later current of decision, which gives to the widow a more free and complete usufruct of her husband's property than is accorded to her by the texts and earlier decisions; a modification of the law which is strongly illustrated by the conflicting opinions of Mr. Justice *Dwarkanath Mitter* and his colleagues in the case of *Kerry Kolitani* v. *Monceram Kolita* (1).

The question was argued at the bar as though it were necessary to divide all the property of a widow into two classes; one being her stridhan, and the other her husband's estate over which she has the widow's right and no more. But the very question is, whether, having regard to the widow's freedom in enjoying her husband's property, and to her established right to alienate her own interest in it, she has not a kind of property the nature of which must remain undecided till her disposal of it or her death. It is impossible to read Mr. Justice *Ainslie's* forcible argument, without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may save and spend again, may she not place her savings so as to get some income from them? And so on through all the steps of the *sorites*.

To decide this question it is necessary to examine the authorities, which are by no means in accord. But their Lordships do not treat as authorities on this question the numerous cases cited at the bar to shew that a widow's savings from her husband's estate are not her stridhan. If she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. The dispute arises when the widow, who might have spent the income as it accrued, has in fact saved it and afterwards attempts to alienate it. And the existing conflict of opinion upon it makes it desirable to pass the authorities briefly under review.

The earliest case which is relied on as an authority for the widow's power of alienation was decided by this Board in the year

(1) 13 Beng. L. R. 1.

1862: *Sreemutty Soorjemoney Dossee* v. *Denobundhoo Mullick* (1). The case however was of a different sort. A Hindu testator's estate was under administration, and there was dispute as to the interests taken by some of the parties. One of them died during the litigation, leaving a widow. He was ultimately declared to be entitled to an absolute interest in a share of the property, and the question then arose, how the income which had accrued from his share should be disposed of. The Supreme Court held that both the income which accrued during his life and that which accrued after his death should be held by his widow in that character. On appeal that decree was varied, and it was declared that, so far as regarded the accumulations after the death of the legatee, his widow was entitled to them absolutely in her own right. Here then the widow had not saved the income in question; she had never had the option of saving or spending it; and all that was done was to recognise her right to the full usufruct and control over it.

In the year 1866 the High Court of *Agra* expressly decided the point in question. A Hindu widow purchased property and afterwards alienated it. The Court first found that it was purchased with the proceeds of her husband's property, and then held that it was ancestral and the alienation invalid.

In the case of *Grose* v. *Amirtamayi Dasi* (2), decided by the *Calcutta* High Court in 1869, Mr. Justice *Macpherson* held, while saying that he had formerly thought the contrary, that accumulations ought to follow the *corpus*. In that case however the accumulations accrued before the widow recovered the estate, and the opinion expressed by Mr. Justice *Macpherson* seems to be at variance with the decision reported in 9th Moore.

In the case of *Bholanath* v. *Bhagabatti* (3), decided in 1871, the *Calcutta* High Court (*Jackson* and *Ainslie*, JJ.) held that a Hindu widow could not alienate property acquired by her out of the income of the husband's estate, but that she could make valid gifts to her daughter and granddaughter by buying property in their names.

This case came before the Privy Council in 1875, when it was

(1) 9 Moore's Ind. Ap. 123. (2) 4 Beng. L. R. O. J. 1.
(3) 7 Beng. L. R. 93.

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held that the widow held the husband's estate not in her capacity of widow but as taker of a life interest after a settlement. But in their judgment the Board said, "If she took the estate only of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate." (*Mussumat Bhagbutti Daee* v. *Chowdhry Bholanath Thakoor and Another* (1)).

In the year 1874, before the appeal in the last case was heard, another case in which the point was discussed had come before the Board: *Gonda Koer* v. *Koer Oodey Singh* (2). In that case there was no alienation by the widow, and the Board treated the point thus:—"It therefore becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself and to sever from the bulk of the estate such purchases as she had made with the view of conferring them on her adopted son." As the case stood, the widow's purchases accrued to her husband's estate.

In 1876 the point came again before the *Calcutta* High Court. The Division Bench, consisting of Judges *Jackson* and *Macdonell*, thought that their decision might be rested on other grounds, but expressed themselves as prepared to base their decision on the ground that a Hindu widow, having purchased land with the money derived from the income of her husband's estate, is competent afterwards to alienate her right and interest in whole or in part, to reconvert the land into money, and to spend it if she chooses (*Sreemutty Puddo Monee Dossee* v. *Dwarkanath Biswas* (3)).

This is the state of the authorities, and their Lordships, differing from the learned Judges below, think it must be taken as adverse to the claim made on behalf of the widow. They do not rest on what was said by them in *Bholanath's* case as decisive of this case, for the observation must be taken as applied to the then pending case, and it was, moreover, extra-judicial, and is fairly open to the qualifications with which Mr. Justice *Ainslie* read it. Nor do they think it possible to lay down any sharp definition of the line which separates accretions to the husband's estate from

(1) Law Rep. 2 Ind. Ap. 260. (2) 14 Beng. L. R. 159.
(3) 25 Suth. W. R. 340.

income held in suspense in the hands of the widow, as to which she has not determined whether or no she will spend it. As before said, they feel the force of Mr. Justice *Ainslie's* reasoning on this point.

In this case the properties in question consist of shares of lands, in which the husband was a shareholder to a larger extent. They were purchased within a short time after his death in 1857. No attempt to alienate them was made till 1873. The object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession, and to give the inheritance to the heirs of one of themselves in preference to their husband's heirs. Neither with respect to this object, nor apparently in any other way, have the widows made any distinction between the original estate and the after-purchases. Parts of both are conveyed to *Dyji* immediately, and parts of both are retained by the widows for life. These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate, and make the after-purchases inalienable by the widows for any purposes which would not justify alienation of that original estate.

The result is that, in their Lordships' opinion, the decree of the High Court should be reversed, and that of the Subordinate Judge restored, and that the Respondents should pay the costs incurred in the High Court and the costs of this appeal. They will humbly advise her Majesty in accordance with this opinion.

Solicitor for Appellants: *T. L. Wilson.*
Solicitors for Respondents: *Henderson & Co.*

J. C.* 1883 June 21, 22; July 11.

RAI BALKISHEN DASS . . . . . APPELLANT;

AND

RAJA RUN BAHADOOR SINGH . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Penalty—Stipulation for Double Rate of Interest under certain Circumstances enforced.

Held, that a provision made in a consent decree by instalments for payment of a double rate of interest was not in the nature of a penalty but a reasonable substitution of a higher for a lower rate, under the following circumstances:—

(*a*) On the whole amount of the decree, which was to become realizable if the first instalment should not be paid at due date, and any two subsequent instalments should be in default and unpaid at the same time.

(*b*) On the like amount, if any instalment except the first were overdue.

(*c*) On the amount of the first instalment if that were overdue.

APPEAL from a decree of the High Court (Feb. 25, 1880), made in certain execution proceedings whereby the order of the Subordinate Judge of zillah *Gya* (July 16, 1879), was set aside.

The order was made on the petition of the Appellant for the execution of a consent decree, which is sufficiently set out in the judgment of their Lordships.

The question upon which the Courts below differed was as to the rates at which and the dates from which interest was to be allowed to the Appellant under the terms of the decree. It related to the construction of the terms of compromise embodied in that decree.

Leith, Q.C., and *Doyne*, for the Appellant.

Cowie, Q.C., and *Woodroffe*, for the Respondent.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal by *Rai Balkishen Dass*, the representative of *Rai Narain Dass*, from an order of the High Court at *Calcutta*,

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

dated the 27th February, 1880, by which an order of the Subordinate Judge of *Gya*, of the 16th July, 1879, was set aside, and the order appealed from was substituted for it.

The determination of the questions which arise in the appeal depends upon what is the proper construction to be put upon the 3rd clause of a decree of the Subordinate Judge of *Gya*, dated 29th March, 1873, in a suit in which *Rai Narain Dass* was Plaintiff, and the Respondent, *Raja Run Bahadoor Singh*, was one of the Defendants.

That decree was obtained by *Rai Narain Dass* in pursuance of a solehnamah or compromise between the parties to the suit.

The amount decreed was Rs.2,38,000 principal, with interest, and by the 2nd article it was ordered, amongst other things, that,—

"The Plaintiff shall get interest on the decretal money at the rate of eight annas per cent. per mensem from Defendants. That the Defendants shall pay annually Rs.30,000 out of the principal and interest year after year by instalments to the Plaintiff; and the Plaintiff, after granting a receipt and filing a petition in the Court, shall take the said sum from Defendants. Out of the annual amount of Rs.30,000, whatever may be found due on account of interest, the decree holder shall deduct the same on account of interest, and credit the balance to the principal. The first instalment shall be in one lump, on the 30th Bhadon 1281 Fusli. In future, year after year, each instalment shall be so paid in a lump sum on the last day of Bhadon of each year. The money covered by the instalment shall be sent to the decree holder at *Benares*, and Defendants shall pay the expenses incurred in sending the same."

The 3rd article, which is the important one, is as follows:—

"If the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid, then the Plaintiff shall have the power to take out execution of the decree, and realize his entire decretal money, with interest at the rate of one rupee per cent. per mensem, from Defendants, and their properties. In case of default, the decree holder shall be entitled to take out execution, and realize interest on the entire decretal

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money from the date of such default to that of realization, at the rate of one rupee per cent. If the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree holder shall have the power to realize the principal with interest at the rate of one rupee per cent. per mensem from the date of this solehnamah, to which your petitioners, Defendants, shall have no objection. If at any time within the term Defendants desire to pay any sum over and above Rs.30,000, the Plaintiff shall have no objection to receive the same."

The first instalment, which fell due on the 30th Bhadon 1281, corresponding with the 25th September, 1874, was not paid on that day. It was, however, paid on the 31st of August, 1875, before the second instalment became payable, and a receipt for the same, dated the 1st of September, 1875, was given by the decree holder acknowledging the payment, and stating that Rs.8,720 were appropriated to the payment of interest on Rs.30,000 from the 29th of March, 1873, the date of the solehnamah, to the said 31st of August, 1875, the date of payment, at the rate of one rupee per cent. per mensem, which, by reason of the default of payment of the instalment on the due date, became payable under the terms of the solehnamah or compromise embodied in the decree, at the rate of one rupee instead of eight annas per cent. per month.

Subsequently, after two instalments had been paid, and a third instalment had become due, an application was made by the decree holder to the Subordinate Judge of *Gya* for execution of the full amount of the decree, with interest at the rate of one rupee per cent. per month, after deducting Rs.60,000 on account of the two instalments which had been paid. That application was made upon the ground that default had been made in payment of the first instalment on due date, and of two consecutive instalments. The Subordinate Judge held that two consecutive instalments were not unpaid within the meaning of the third clause of the decree. He therefore ordered that the petition for the execution of the decree by realization of the entire decretal money in one lump, with interest at the rate of one rupee per cent. per month, should be rejected, but that for the instalment then overdue the decree should be executed.

Upon appeal the High Court, on the 29th July, 1878, affirmed the decision and no appeal to Her Majesty in Council from that judgment has been preferred. It therefore stands unreversed. The Judges of the High Court stated that, in their opinion, the view taken by the Subordinate Judge of the arrangement between the parties was correct, and that the intention evidently was that no two instalments should be outstanding at the same time, and that, provided the debtor pay up the first instalment after due date, but in sufficient time to guard against a second instalment becoming overdue whilst the first remained unpaid, he was to be allowed to do so on payment of a double rate of interest as a penalty, but that, if he went further, and allowed two instalments to be actually due and unpaid at one and the same time, the arrangement would fall to the ground, and the whole amount of the decree would be realizable in a lump sum.

Independently of the fact that no appeal was preferred against that decision, their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solehnamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others.

In a subsequent judgment, dated the 25th of February, 1880, to which advertence will be made presently, the High Court say:—

"It was one of the terms of the solehnamah that if at any time two instalments were due at the same time, the whole of the debt should be recoverable forthwith, and the interest, which otherwise was to be calculated at 6 per cent. per annum, should be calculated at 12 per cent.; and there was a further term in the solehnamah that if the first instalment was not paid in due time interest should be calculated at the rate of 12 per cent. instead of 6 per cent. from the date of default until realization.

"There is no specific mention in the solehnamah of any other instalment than the first, but this being a decree of Court, we think that the language of it is capable of a more liberal construction than if it had been simply a deed between the parties,

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and we are of opinion that the same conditions must be considered applicable to default on every instalment which are made applicable in default of the first instalment."

Their Lordships think it right in this place to refer to that part of the judgment, in order to point out that, in their opinion, the decree holder could not, under the first paragraph of the 3rd clause of the solehnamah, issue execution for the full amount of the judgment, with 12 per cent. interest, unless both the first instalment should not be paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments should be in default and unpaid at the same time. The High Court would read the words "first instalment" as if they had been "any instalment," and the words "on the 30th Bhadon 1281 Fusli," as if they had been on the 30th Bhadon 1281 Fusli, or on the last day of Bhadon in any year, as the case may be." Their Lordships think that the words "first instalment" must be read in their strictly literal sense, and that the word "and" in that paragraph must be read in the conjunctive and not in the disjunctive, and consequently that the non-payment of the first instalment on the due date was a material part of the contingency contemplated by the first clause, and the allowing of two instalments to be in arrear at the same time the other portion of that contingency.

The only remaining question is whether, in default of payment of any instalment other than the first on the due date, interest from the date of such default until the realization of the instalment was to be paid upon the full amount of the principal remaining unpaid at the time, or only upon the amount of the instalment.

The Subordinate Judge, in his judgment of the 16th July, 1879, after giving his reasons, says, "Hence it clearly appears that the object aimed at by the solehnamah was that in case of breach of instalment the decree holder would get interest on the expired instalment at one rupee per cent. per month in the place of eight annas per cent., and he decreed accordingly." Both parties appealed to the High Court from that decision.

On the 25th of February, 1880, the High Court appear to have agreed with the Subordinate Judge in thinking that the increased rate of interest was to be paid on the amount of the instalment in

default, and not upon the whole amount of the debt. Their judgment and decree are quite unintelligible. They order the decree of the Subordinate Judge to be set aside, and then they declare that the first instalment of Rs.30,000, which had been paid, is to be treated as not having been paid; afterwards they declare that in adjusting the account between the parties it must be taken that the said first instalment was duly paid on the 25th of September, 1874, and that all subsequent payments must be taken to have been properly made for the purposes of the subsequent instalment, and that in dealing with those instalments interest will be calculated at 6 per cent. per annum on the whole debt, and the capital will be paid off by the residue of such instalments, after providing for interest at that rate. Then they order the judgment debtor within six months from the date of the decree to pay to the decree holder the said first instalment, with interest at 12 per cent., and that in default thereof the decree holder may apply, and the Court reserves the power of reconsidering, and if necessary of altering, the terms of the decree.

The reason given by the High Court for holding that in default of payment of a second or subsequent instalment on due date interest is to be calculated upon the amount of the instalment, and not upon the amount of the whole decretal money, is that in the receipt given for the first instalment a portion of it, viz., Rs.8,720, is appropriated to the payment of interest at 12 per cent. upon the amount of the first instalment, and not upon the whole debt. It is said,—

"According to the strict construction of the solehnamah, I myself have doubts whether the Plaintiff would not be entitled to 12 per cent. interest upon the whole amount for the time being due between the due date of each instalment and the time it was actually paid, that is, from the date of default of payment until its realization; but inasmuch as the parties themselves, when the first instalment was paid, have put a construction upon this instrument, and have treated the interest as calculable on Rs.30,000 and not on the whole sum, and as the Judge of the Court below, as we understand his judgment, has decided in the same way, we think we ought not to interfere with that decision, because the effect of calculating interest only upon the instalment upon that

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first occasion may have misled the other side, and may very seriously prejudice them if any other construction is now put upon the instrument; for, if upon that occasion the Plaintiff had claimed to be entitled to 12 per cent. upon the whole amount of the debt, and not to 12 per cent. on the instalment only, it is not improbable that the Defendant might have been careful to pay up what was due, and not have continued in default, as he appears to have done."

Their Lordships are of opinion that according to article 3 of the decree of 1873 three contingencies were in the contemplation of the parties.

The first is, if the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid. The second, "in case of default." The third, if the first instalment be not paid on the 30th Bhadon 1281 Fusli. The first has already been considered and dealt with. Upon the third the parties have put their own construction, and have voluntarily settled upon the basis of that construction, which their Lordships cannot say was wrong. The decree holder is bound by it, and cannot, in the settlement of accounts, recover interest at 12 per cent. in respect of the default in payment of the first instalment from the date of the solehnamah to the date of realization of that instalment except upon the amount of the instalment, interest upon the remaining portion of the debt during that period being calculated at 6 per cent. per annum.

In determining upon what amount interest at 12 per cent. per annum is to be allowed in consequence of a default in payment on the due date of the second or any subsequent instalment, the decree holder is not bound by the construction put by him upon the 3rd clause, nor by any admission or settlement in respect of the default made in payment of the first instalment. The wordings of the second and third contingencies respectively are very different. The second is clear and explicit. It declares that in case of default the decree holder shall be entitled to take out execution and realize interest on the entire decretal money from the date of such default to the date of realization, at the rate of one rupee per cent. per mensem. The third declares that if the first instalment be not paid on the 30th Bhadon 1281

Fusli, then the decree holder shall have the power to realize the principal, with interest at the rate of one rupee per cent. per mensem from the date of the solehnamah.

It was contended that the words "in case of default" were intended to refer to the default provided against by the first contingency. But in their Lordships' opinion it cannot be construed as having that meaning, for it was declared that upon the happening of the first contingency the entire decretal money, with interest at 12 per cent., might be realized, whereas in case of default it was declared merely that interest on the entire decretal money might be realized at the rate of one rupee per cent. per mensem.

The instalment itself would be of course realizable under the decree, and out of it, according to the 2nd article, interest at 6 per cent. upon the decretal money, except during the period for which interest at 12 per cent. was to be levied, would be payable.

If the words, "in default, &c.," referred to the default contemplated in the first contingency, the words "the decree holder shall be entitled to take out execution and realize, &c.," were useless and inapplicable, for words to the same effect had been previously used with reference to principal and interest; whereas in the 2nd article they apply merely to the interest.

The words "the principal" in the third contingency, viz., the non-payment of the first instalment on the due date, could not refer to the whole decretal money, otherwise the third contingency would be at variance with the first.

By the words, "in case of default," in the second contingency, their Lordships are of opinion that a default in payment on due date of any instalment, except the first, was provided for. They had no reference to the first contingency for the reasons already expressed. They did not refer to the non-payment of the first instalment, for that is specifically provided for, and to complete the first contingency it was necessary that in addition to the non-payment of the first instalment on the due date two consecutive instalments should also be unpaid at the same time.

The word "principal" in the third contingency, therefore, evidently referred to the principal of the first instalment, and not to the entire decretal money, as specified in the first and second

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contingencies. The parties, by putting that construction on the words of the third contingency, are clearly not bound to have the same construction put upon the clear words used with reference to the second contingency, viz., "to realize interest on the entire decretal money."

It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances.

Their Lordships are of opinion that the judgment and decree of the High Court of the 25th of February, 1880, ought to be reversed, and that it ought to be declared that in adjusting the accounts between the parties, for the purpose of the proceedings in execution of the decree of 1873, the Defendant is to be charged with the principal sum of Rs.2,38,000 and interest at 8 annas per cent. per mensem from the date of the decree upon the said principal sum, or so much thereof as from time to time remains due after giving credit for all payments made on account, together with additional interest at the same rate on the first instalment from the date of the solehnamah to the payment of such instalment, and also additional interest at the same rate on the principal sum remaining unpaid for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid or realized, and that each instalment or any payment on account thereof as paid is to be credited first in discharge of the interest then due and the balance towards reduction of the principal.

Their Lordships will humbly advise Her Majesty to the above effect.

The Respondents must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*
Solicitors for Respondent: *Watkins & Lattey.*

SURENDRANATH BANERJEA . . . . APPELLANT;

AND

THE CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL . . } RESPONDENTS.

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1883
July 13, 18.

In re SURENDRANATH BANERJEA.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Powers of High Court—Contempt of Court—Special Leave to appeal.

Held, that the High Court has power to punish summarily by imprisonment contempt of Court committed by the publication of a libel out of Court when the Court is not sitting.

Such a case is not a proper one for an appeal to Her Majesty.

THIS was a petition for special leave to appeal from an order of the High Court (May 5, 1883), whereby the Petitioner had been committed to the custody of the gaoler of the presidency gaol for a period of two calendar months.

The Petitioner stated that since 1879 he had been editor and proprietor of a weekly newspaper called the *Bengalee*, which was printed at *Calcutta*, in English; that on the 26th of April, 1883, there appeared in the *Brahmo Public Opinion*, also a weekly newspaper in English, a paragraph commenting on the conduct of Mr. Justice *Norris*, in regard to having ordered a salgram, or stone symbol of a Hindu deity, to be brought into the corridor of the Court on the 19th of April, for the purposes of identification; that honestly believing that the said paragraph contained a true account of the incident, he did, in good faith and from a sense of public duty, on the 28th of April publish in the *Bengalee* the following:—

"The Judges of the High Court have hitherto commanded the universal respect of the community. Of course, they have often erred and have often grievously failed in the performance of their duties. But their errors have hardly ever been due to

* *Present:* — SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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impulsiveness or to the neglect of the commonest considerations of prudence or decency. We have now, however, amongst us a Judge, who, if he does not actually recall to mind the days of *Jeffreys* and *Scroggs*, has certainly done enough within the short time that he has filled the High Court Bench to shew how unworthy he is of his high office, and how by nature he is unfitted to maintain those traditions of dignity which are inseparable from the office of the Judge of the highest Court in the land. From time to time we have, in these columns, adverted to the proceedings of Mr. Justice *Norris*. But the climax has now been reached, and we venture to call attention to the facts, as they have been reported in the columns of a contemporary. The *Brahmo Public Opinion* is our authority and the facts stated are as follows:—

"Mr. Justice *Norris* is determined to set the *Hugli* on fire. The last act of zubberdusti on his Lordship's part was the bringing of a salgram, a stone idol, into Court for identification. There have been very many cases both in the late Supreme Court and the present High Court of *Calcutta* regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honour of being dragged into Court. Our *Calcutta Daniel* looked at the idol and said it could not be a hundred years old. So Mr. Justice *Norris* is not only versed in law and medicine, but is also a *connoisseur* of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of *Calcutta* will tamely submit to their family idols being dragged into Court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a *quietus* to the wild eccentricities of this young and raw dispenser of justice."

The Petitioner further stated that on the 3rd of May he was served with a rule nisi, and that on learning the facts stated in the affidavits which had been filed, he filed an affidavit which, after admitting the authorship of the article in question and stating that he had discovered from the said affidavits that the statements in the *Brahmo Public Opinion* were inaccurate, and that Mr. Justice *Norris* had acted under pressure from the parties to the suit before him, who were both Hindus, and apologising for his conduct in unwittingly publishing matter of such

reprehensible character, submitted that the Court had under the circumstances no jurisdiction to issue the said rule. He added that his advocate, Mr. *W. C. Bonnerjee*, speaking for himself and not under instructions, stated to the Court that he was not prepared to apply for time with a view to argue the question of jurisdiction, and that he would not argue it even if he were; that in the absence of argument the order complained of was passed on the 5th of May.

The material passage of the judgment of the Chief Justice delivered in passing sentence is given below. The Court (*Garth*, C.J., *Cunningham*, *McDonnell*, and *Norris*, JJ.) unanimously held that there had been a contempt of Court, but *Mitter*, J., dissented in regard to the sentence imposed.

"Now so far from there being the least foundation for this tissue of abuse, it appears from the affidavits upon which the rule was issued (which are now admitted by yourself to be perfectly correct), that the account given in the *Brahmo Public Opinion* and your own comments upon it were wholly without foundation. The truth of the matter was this. In a case which was tried before the learned Judge, a question arose as to the identity of a certain thakoor or idol. It was necessary for the purpose of determining that question to ascertain whether a particular thakoor, which was then in the custody of one *Bhuttuck Nath Pundit* in *Burrabazar*, was the family thakoor of certain parties to the suit. For the purpose of determining that question it was suggested by the counsel on both sides that the thakoor should be brought into Court for the purpose of identification. Mr. Justice *Norris* hesitated to take that course until he had inquired from the attorneys on either side, who were Hindus, whether there would be any objection to it. Their answer was that there would be none. His Lordship then further inquired from a person named *Gouri Kanta Burman*, who was in Court and who was an agent of the plaintiff, whether he saw any objection; and his answer was that the idol could not be brought into the Court itself, on account of the coir-matting with which the floor was covered, but that it might be brought without objection into the corridor.

"The learned Judge then, in order to certify himself still further, sent for the Court interpreter, *Babu Bani Madhub Mookerjee*, who

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is an officer of great experience and a high caste Brahmin, and made the same inquiry of him. He asked whether the thakoor was a salgram, and finding that it was, gave the same answer as *Gouri Kanta*—namely, that it could not be brought into Court on account of the matting, but that it might with perfect propriety be brought into the corridor. Upon this, his Lordship granted the application, and a *subpœna duces tecum* was issued to *Bhuttuck Nath Pundit* to produce the thakoor the same day, and in order to ensure the orders of the Court being properly carried out, it was further ordered that the interpreter himself should proceed with the officer to *Bhuttuck Nath Pundit's* house (who was himself a Brahmin), and should see to the proper conveyance of the thakoor to the Court.

"We have the affidavit of *Bani Madhub Mookerjee* himself, who after confirming the above facts, informs us that in obedience to the order of the Court, the thakoor was duly conveyed into the corridor by himself and the pundit; and the learned Judge, attended by counsel on both sides and the attorneys, left the Court and went into the corridor for the purpose of inspecting it.

"It seems, therefore, impossible for any one, however strict his religious views on such subjects may be, to say that Mr. Justice *Norris* did not take the utmost pains—in the first place, to ascertain whether the thakoor ought to be brought to the Court at all, and, in the next place, to provide that it should be brought with all due respect and propriety.

It may be perfectly true that European Judges, and more especially Barrister Judges, are often imperfectly acquainted with the religious views and feelings of the Hindu community; and the utmost they can do, when occasion arises, is to consult those who are best informed upon the subject, and to be guided by their advice.

But we now understand from your own affidavit, as well as from your counsel Mr. *Bonnerjee*, that you admit that the learned Judge did everything in his power to ascertain the truth of the matter, and to avoid giving the least offence to the religious feelings of your countrymen.

"It therefore only remains for us to consider what punishment we ought to inflict upon you."

It appeared that the Petitioner had thereupon addressed a

memorial to the Viceroy of *India* for transmission to Her Majesty, in order that it might be referred to the Judicial Committee under 3 & 4 Will. 4, c. 41, s. 4. Nothing was done by the *India Office* in reference thereto, and accordingly this petition was presented.

Cowie, Q.C. (*Woodroffe* with him), for the Petitioner, contended in support of his application for special leave to appeal that the contempt had been committed out of Court, that although the article in question was a libel, it had not been written to influence or to affect the particular case, that it was not written upon a Judge in his judicial capacity and during the proceeding of the case. Two questions arose, first, whether in a case in a Superior Court of Record not being one of the Superior Courts at *Westminster* a summary proceeding for contempt is the authorized course in the case of a libel out of Court on a Judge in his judicial capacity after the case was concluded. Secondly, whether, having regard to the terms of the Indian Penal Code and of the Criminal Procedure Code, 1882, any summary jurisdiction which formerly might have existed to commit for contempt had been abolished. As regards the powers of the High Court reference was made to 13 Geo. 3, c. 63, s. 13, and the Charter, sects. 13, 18; the *High Courts Act*, 24 & 25 Vict. c. 104. Then to the Penal Code, sect. 172, "On Defamation," sect. 499 *et seq.* and sect. 228; Code of Criminal Procedure, 1882, sect 4 (interpretation), sect. 5, Schedule II. and sect. 480 *et seq.* The combined effect of the Penal and Procedure Codes, see sect. 5 of the latter Code, was that a contempt out of Court is remitted to the general head of defamation, to be tried according to the provisions thereinafter contained, *i.e.*, in Act X. of 1882. Whatever might have been the powers of the Supreme Court to punish for a contempt committed either in or out of Court, the only legal mode at present of punishing such an act as that of the Petitioner's is by proceedings taken under the Criminal Procedure Code to enforce an appropriate section of the Penal Code. Neither in the statute nor in the Charter relating to the High Court were there declared in any general clause the general powers of the English Superior Courts as appertaining to the Supreme Court. The writ of *habeas corpus* was issued under a general authority of the Court. Act X. of 1882 had placed the

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power to issue it upon a definite footing and had omitted to make a similar provision with regard to commitment for contempts out of Court. The summary procedure provided in the Code (sect. 480) was for contempts committed in the face of the Court: see sects. 177, 178, 179, 180, 228, of the Penal Code. Reference was also made to sects. 480, 481, 482, 198 of Act X. [SIR BARNES PEACOCK referred to sect. 1 and the common law.] The words in sect. 1, "special jurisdiction or power conferred or any special form of procedure prescribed by any other law now in force," mean a law which is special as regards the subject. And it was submitted that there was no law, special or otherwise, which conferred upon the Courts in *India* any special power as distinct from the Code of Criminal Procedure: see sect. 4 of Act X. of 1882, and sect. 41 of the Penal Code for definition of special law as that term is used in sect. 1 of Act of 1882. Unless the libel has a direct tendency to interfere with or obstruct the course of justice in a pending case, it cannot be dealt with summarily as a contempt of Court. Reference was made to *Birch* v. *Walsh* (1), which contains a summary on the law of constructive contempt; to *McDermott* v. *Judges of British Guiana* (2); *In re Ramsay* (3); *The Queen* v. *Lefroy* (4); *In re Pollard* (5); *The King* v. *Creevy* (6); *Smith* v. *Justices of Sierra Leone* (7). With regard to the *locus standi* of the Petitioner it had been decided that where a matter has been referred by Her Majesty to the Judicial Committee, which is not strictly an appealable grievance, special leave to appeal may be granted under 3 & 4 Will. 4, c. 41, s. 4: see *Morgan* v. *Leech* (8); *In re Skinner* (9). The Petitioner was in consequence of what had passed disqualified as a member of the Municipal Corporation, Act IV. of 1876 (*Bengal* Council), sect. 23.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The only question to be determined is whether the High Court

(1) 10 Ir. Eq. Rep. 93
(2) Law Rep. 1 P. C. 260; Law Rep. 2 P. C. 359; 5 Moore P. C. (N.S.) 466.
(3) Law Rep. 3 P. C. 427.
(4) Law Rep. 8 Q. B. 134.
(5) Law Rep. 2 P. C. 106.
(6) 1 M. & S. 273.
(7) 3 Moore's P. C. 361.
(8) 3 Moore's P. C. 368.
(9) Law Rep. 3 P. C. 457.

had jurisdiction to commit the Petitioner for a contempt of Court in publishing the libel set out in the petition.

Their Lordships took time to consider, in order that they might carefully examine the provisions of the Code of Criminal Procedure, 1882, which came into force in January 1883. Having done so, they are clearly of opinion that, notwithstanding that Code, the High Court had jurisdiction.

The Penal Code for *British India* was referred to by the learned counsel for the Petitioner, and in particular chap. 11, sect. 228, and chap. 21 of "Defamation." But that Code merely defines the several offences thereby created, and provides the punishments to which offenders are to be liable. It does not at all affect the procedure by which offenders are to be brought to punishment. It is only by the Code of Criminal Procedure, read in conjunction with the Penal Code, that the jurisdiction of the High Court to commit for contempt was, if at all, affected.

Section 228 of the Penal Code, which was referred to in the argument, does not apply to the present case; it relates merely to insult or interruption to a public servant while sitting in a stage of a judicial proceeding. It does not provide against a contempt of Court committed by the publication of a libel out of Court when the Court is not sitting.

The chapter 21 "Of Defamation," does not define "contempt of Court" or make any provision for the punishment of a contempt of Court by the publication of a libel reflecting upon a Judge in his judicial capacity or in reference to his conduct in the discharge of his public duties. The offence, as a case of defamation, might doubtless have been punished under that chapter with simple imprisonment, not exceeding two years, or with fine, or with both. If the procedure of the Criminal Procedure Code had been adopted, and the Petitioner had been convicted of simple defamation under chap. 21 of the Penal Code, and, after his apology, had been sentenced by the Court to two months' imprisonment, there would have been no pretence for an application for special leave to appeal against the conviction.

But it is not because the publisher might have been punished for defamation that he could not be punished summarily as for a contempt of Court.

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Lord *Hardwicke*, in the case of *The Champion* (1), says: "To be sure, Mr. Solicitor-General has put it on upon the right footing that, notwithstanding this should be a libel, yet, unless it is a contempt of Court, I have no cognisance of it; for whether it is a libel against public or private persons, the only method is to proceed at law."

The libel in the present case was clearly a contempt of Court. It is contended, however, on the part of the Petitioner that, by reason of the Code of Criminal Procedure, 1882, the Court could not deal with it as a contempt of Court or punish the offender by commitment in a summary manner.

Several sections of that Code were referred to.

Section 198 enacts, amongst other things, that no Court shall take cognisance of an offence under chapter 21 of the Indian Penal Code, *i.e.*, the chapter "Of Defamation," except upon a complaint made by some person aggrieved by such offence.

"Complaint is defined in sect. 4 a to mean the allegation made orally or in writing to a magistrate with a view to his taking action," &c.

Section 195 enacts that no Court shall take cognisance of an offence under sect. 228 of the Indian Penal Code (*i.e.*, the offering insult to a public servant whilst sitting in any stage of a judicial proceeding) when such offence is committed in or in relation to any proceeding in any Court, except with the previous sanction or on the complaint of such Court or of some other Court to which it is subordinate.

It is scarcely possible to suppose that the procedure above pointed out was intended to apply to the case of an insult to or a libel upon the High Court or a libel upon one of the Judges thereof, imputing corruption or misconduct or incapacity in the discharge of his public duties, or a libel such as that set out in the petition.

Section 480 and the two following sections of the Code of Criminal Procedure were referred to in the argument in support of the petition, but they do not apply to a case of libel or defamation out of Court whilst the Court is not sitting, and have no direct bearing on the present case.

(1) 2 Atk. 469.

Section 5 was also referred to, and it was contended on the part of the Petitioner that, according to the provisions of that section, the procedure provided by the Code of 1882 was the only one which could be adopted.

That section is in the words following:—

"All offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter contained; and all offences under any other law shall be inquired into and tried according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences."

Their Lordships are of opinion that a contempt of the High Court by a libel such as the present, published out of Court when the Court is not sitting, is not included in the words "offences under the Indian Penal Code," although the contempt may include defamation. Such an offence is something more than mere defamation, and is of a different character. It is an offence which by the common law of *England* is punishable by the High Court in a summary manner by fine or imprisonment, or both. That part of the common law of *England* was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it are the same there as in this country, not by virtue of the Penal Code for *British India* and the Code of Criminal Procedure, 1882, but by virtue of the common law of *England*: *McDermott* v. *Judges of British Guiana* (1).

The words "all offences under any other law" in sect. 5 cannot be intended to include a contempt like the present, for which no provision is made by the Code. It is unnecessary, therefore, to consider what is the true construction of the words "any special jurisdiction or power conferred by any other law now in force" in sect. 1.

Their Lordships having decided that the libel was a contempt of Court, and that the High Court had jurisdiction to commit the Petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty.

(1) 5 Moore P. C. (N.S.) 497.

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In the case of *Rainy* v. *Justices of Sierra Leone* (1), upon an application for leave to appeal to enable the Petitioner to get rid of certain fines imposed upon him by the Court of *Sierra Leone* for contempts of Court, it was said,—"It is the opinion not only of the members of the Committee who heard the petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of Record is the sole and and exclusive judge of what amounts to a contempt of Court." That case was referred to as an authority by the Judicial Committee in the case of *McDermott* v. *Justices of British Guiana* (2).

In the latter case an application was made *ex parte* for leave to appeal from an order of the Supreme Court of Civil Justice in *British Guiana*, by which the Petitioner was, for a contempt of Court in publishing certain libels commenting on the administration of justice, and upon one of the Judges of the Court, committed to gaol for a period of six months or until further orders. See S. C., p. 490, and 4 Moore, P. C. (N.S.), 110, 120. Leave to appeal was granted without prejudice to the question of the competency of Her Majesty in Council to entertain an appeal from an order of a Court of Record inflicting punishment by fine or imprisonment for a contempt of Court, which question was to be open to argument on the hearing of the appeal. The case came on for argument, and it was contended by the Solicitor-General that the leave to appeal ought not to have been granted, as a Court of Record is the sole judge of what constitutes a contempt. He stated, however, that he was prepared to support the order upon the merits, but he was not called upon to do so.

In delivering the opinion of the Judicial Committee, Lord *Chelmsford*, after stating that the leave to appeal was conditionally granted, said the Respondents might have come in to discharge the order upon the very ground which had been taken, namely, that there could be no appeal against an order of a Court of Record committing a person for contempt, and that, in order to support the propriety of the leave to appeal, the Appellant must shew either that the Court was not a Court of Record, or that, if it was a Court of Record, yet that there was something

(1) 8 Moore's P. C. 54. (2) 5 Moore's P. C. (N.S.) 466.

in the order committing the Appellant which rendered it improper, and therefore the subject of appeal. Then, after deciding that the Court at *Sierra Leone* was a Court of Record, his Lordship says (p. 498): "Not a single case is to be found where there has been a committal by one of the Colonial Courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description." Again, after referring to the authorities, and amongst others to *Rainy's Case* (1), his Lordship concluded by saying: "Under these circumstances their Lordships entertain no doubt whatever as to the propriety of deciding that in this case the leave to appeal ought not to have been granted; that the Supreme Court of Justice was a Court of Record; and that, as a Court of Record, it had power to commit for the particular contempt. As their Lordships do not enter into the merits of the case, they will say nothing as to the character of the libel upon which the Court thought it proper to commit the publisher for contempt."

Acting upon these authorities, and holding that the High Court had jurisdiction to commit the publisher of the libel in question for contempt, their Lordships will say nothing as to the character of the libel, or as to the extent of the punishment awarded. They will humbly advise Her Majesty to dismiss the petition.

Solicitor for the Petitioner: *T. L. Wilson.*

(1) 8 Moore's P. C. 54.

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